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HARVARD LAW

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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF ALABAMA,
DURING
JANUARY TERM, 1875, AND A PART OF JUNE
TERM, 1875.
BY
THOMAS G. JONES,
STATE REPORTER.
VOL. LII.

0-10/21/21

MONTGOMERY, ALA.
PUBLISHED BY JOEL WHITE.
NEW YORK: HURD AND HOUGHTON.
Cambridge: The Riverside Press.
1876.

Entered, according to Act of Congress, in the year 1876, by
JOEL WHITE,
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Rec. Dec. 4, 1876

RIVERSIDE, CAMBRIDGE:
PRINTED BY H. O. HOUGHTON AND COMPANY.

OFFICERS OF THE COURT

DURING THE TIME OF THESE DECISIONS.

ROBERT C. BRICKELL, CHIEF JUSTICE, *Huntsville, Ala.*

THOMAS J. JUDGE, ASSOCIATE JUSTICE, *Greenville, Ala.*

AMOS R. MANNING, ASSOCIATE JUSTICE, *Mobile, Ala.*

JOHN W. A. SANFORD, ATTORNEY GENERAL, *Montgomery, Ala.*

D. B. BOOTH,¹ CLERK, *Prattville, Ala.*

THOMAS J. RUTLEDGE,² CLERK, *Montgomery, Ala.*

JUNIUS M. RIGGS, MARSHAL, *Montgomery, Ala.*

¹ Resigned, April 15th, 1875.

² Appointed to fill vacancy caused by resignation of D. B. Booth, Esq.

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CASES

IN

THE SUPREME COURT OF ALABAMA.

JANUARY TERM, 1875.

Powell v. The State.

Indictment for Murder.

Threats by deceased; when admissible in favor of defendant.—In this case it was held, upon the authority of *Dupree v. The State* (33 Ala. 380), that threats made by the deceased, a short time before the commission of the homicide, indicating an angry and revengeful spirit towards the prisoner and a determination to do violence to his person, which were communicated to the prisoner a short time before the killing, are admissible evidence in his favor.

APPEAL from Lauderdale Circuit Court.

Tried before Hon. JAMES S. CLARK.

The appellant, John Powell, was convicted of murder in the second degree for killing one James Winston, and sentenced to the penitentiary for twenty years. On the trial, appellant introduced testimony tending to show that the deceased had come to Powell's house about nine o'clock at night, having gone out of his way to do so, called Powell out to the door and said to him that one of them must die, and on being asked "if he meant it," replied that he did, all the time having his hand in his pocket, whereupon Powell stepped back into the house, got a gun and fired upon Winston, killing him instantly.

After offering this testimony, appellant introduced a witness, one McCullough, who testified that on the morning of the killing he saw deceased with a shot gun, which he said he had obtained for the purpose of killing Powell, and that he would kill him that very day. The witness being unable to dissuade the deceased, communicated the threats to Powell a few hours be-

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[Hogg v. State.]

fore the killing, and advised him to be on his guard. On motion of the solicitor the court excluded the testimony of this witness, and the defendant excepted and now assigns this ruling as error.

H. C. JONES and O'NEAL & O'NEAL, for appellant, cited *Pritchett v. The State*, 22 Ala. 40; *Burns v. The State*, 49 Ala. 372.

JNO. W. A. SANFORD, Attorney General, *contra*.

BRICKELL, C. J. — The threats to take the life of the accused, made by the deceased, were made on the day of the homicide, and communicated to the accused but a few hours before it occurred. There was evidence tending to show the deceased had gone out of his way, to the residence of the accused, in the night-time, called him out, and declared one or the other should die. The accused inquired if he meant what he said, and his reply being affirmative, while his hand was in his pocket, the accused stepped into his house, got his gun, and fired upon deceased, killing him instantly. The threats were excluded from the jury, as evidence. They should have been admitted. The case does not materially differ from that of *Dupree v. State* (33 Ala. 380), in which the court ruled, that threats made by the deceased a short time before the commission of the homicide, indicating an angry and revengeful spirit towards the prisoner and a determination to do violence towards his person, which were communicated to the prisoner before the homicide, are admissible as evidence. That decision is supported by the weight of authority, and compels a reversal of this cause.

The judgment is reversed and the cause remanded. The prisoner must remain in custody until discharged by due course of law.

Hogg v. The State.

Indictment for Carrying Concealed Weapons.

1. *Written charges; how may be explained.* — Section 2756 of the Revised Code, which requires written charges to be given or refused in the terms in which they are asked, does not forbid the court after giving a written charge, at the defendant's request, as to a particular phase of the testimony, from instructing the jury in another charge, that they must look to all the evidence and not a part of it, in forming their verdict.

2. *Concealed weapon; burden of proof as to exculpatory facts.* — The carrying of a weapon concealed not being denied, it is not error to instruct the jury, who have been previously charged as to the law of the case, "if they are not satisfied from all the evidence that the defendant had good reason to apprehend an attack" (that being the only defence) "they must find him guilty."

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APPEAL from Circuit Court of Covington.

Tried before Hon. P. O. HARPER.

The opinion states the case.

W. D. ROBERTS, for appellant. — The court below should not have qualified the charge given at appellant's request. 48 Ala. 45; 45 Ala. 89. Such action is in plain violation of the statute, and will necessitate a reversal.

JOHN W. A. SANFORD, Attorney General, *contra*. — 1. The charge given might properly have been refused. 39 Ala. 674. It certainly could not deprive the court of the right to explain it. *Morris v. State*, 25 Ala. 57; *Turbeville v. The State*, 40 Ala. 715.

2. The latter part of the last charge of the court is good law. It is couched in language almost identical with the statute. Independent of this, it is correct as to the burden of proof. 40 Ala. 271; 27 Ala. 272.

MANNING, J. — The appellant was indicted, under section 3555 of the Revised Code, for carrying a pistol concealed about his person. The evidence being in, and the court having charged the jury, defendant asked the court to give the following charge in writing: "That if the jury believed from the evidence that Mr. Kilpatrick" (one of the witnesses) "informed the defendant, before the carrying of the concealed weapons, that he had been informed by Miss Williams that Mr. Barrow had hired two negroes to waylay and kill the defendant, that they may look to it to see whether the defendant had good reasons to apprehend an attack, and if they so found that defendant had good reasons to apprehend such an attack, then they must find the defendant, *not guilty*." "The court gave said charge, and further charged the jury that they must look to all of the evidence, and not a part of it, and look at all of the surrounding circumstances, and if they were not satisfied from the evidence that defendant had good reasons to apprehend an attack, then they must find the defendant 'guilty.' And to the court giving said further charge, the defendant excepted."

It has been decided by this court, that when charges from a court to the jury are asked in writing, they must be given or refused, according to section 2756, "in the terms in which they are written," without qualification by the court. *Edgar v. The State*, 48 Ala. 45; *Knight v. Clements*, 45 Ib. 89; *Lyon & Co. v. Kent et al.* 45 Ib. 656.

But the statute does not declare, that the judge shall not thereafter open his mouth to the jury on the subject of their

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duty in the cause. This court has held that he may explain such charge. *Morris v. The State*, 25 Ala. 57; *Turbeville v. The State*, 40 Ib. 715.

The charge asked and given in this cause might have led some of the jurors to understand that its effect was to make their verdict depend chiefly or especially on Kilpatrick's testimony. If the judge was of this opinion, it was not illegal for him to inform the jury that it was their duty to keep in mind the other evidence also, and let their verdict be predicated upon a just and impartial view of the whole. No upright judge will avail himself of the authority to do this, for the purpose of overturning the charge which he has given to the jury upon the application of a party, and which the jury take in writing with them, on their retirement to make up their verdict. This is a means provided by the statute of preventing the jury from being misled as to the law of the case.

There was no dispute as to the fact that defendant did carry a pistol concealed about his person. In order to exonerate him from a violation of the law in doing so, it might be shown that he had "good reason to apprehend an attack." This was an exculpatory fact, to be established in order to entitle the defendant to a verdict of not guilty. And the further charge excepted to does not improperly so instruct the jury.

It certainly seems from the evidence set forth in the bill of exceptions, that the exculpatory fact was pretty clearly proved. But we cannot tell what weight the jury, in view of the manner of testifying on the part of the witnesses, thought proper to give to the evidence on that point. If it ought to have prevented a verdict of guilty, a motion to set aside the verdict and grant a new trial made to the court below was the proper mode of correcting the error. The judgment is affirmed.

State ex rel. Bryan v. McDuffie, Judge, etc.

Appeal from Judgment dismissing Petition for Prohibition.

1. *County court ; of what proceeding has not jurisdiction.* — The county court has no jurisdiction, either under the statutes or its power to punish for contempts, of a proceeding to impose upon the sheriff the fine of \$100, authorized by § 4167 B. C., for his failure, from want of due diligence, to execute a "writ of arrest;" and if it takes cognizance of such a proceeding the sheriff is entitled to prohibition to restrain its action in the matter.

2. *Costs ; when not imposed.* — In this case, although the judgment of the circuit court was reversed and a peremptory writ of prohibition issued, no costs were imposed on the county judge.

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[State v. McDuffie.]

APPEAL from Circuit Court of Lowndes.

Tried before Hon. JAMES Q. SMITH.

A *capias*, issued from the county court, having been placed in the hands of Bryan, sheriff of the county, and returned "*non est*," the county solicitor, after giving the sheriff due notice, moved the county court (Hon. J. V. McDUFFIE, probate judge, presiding) for judgment in the name of the State, for the use of the county, against the sheriff, to recover of him a fine of one hundred dollars for his failure, from want of due diligence, to execute the warrant of arrest. The sheriff demurred to the jurisdiction of the court and moved to dismiss the case, but the demurrer and motion were both overruled and the motion set for a hearing at the next monthly term.

Upon the sheriff's petition for prohibition, reciting these facts, the judge of the second judicial circuit, in vacation, ordered that a rule issue to the judge of the county court commanding him to show cause at the next term of the circuit court of Lowndes, why he should not be prohibited, &c. At the next term the parties appeared, and the court overruled relator's motion to make the rule absolute, dismissed the petition, and taxed relator with the costs.

It is now assigned as error that the court erred in not making the rule absolute, and in dismissing the petition.

ELMORE & COOK, for appellant.

R. M. WILLIAMSON, *contra*.

JUDGE, J. — We think it clear that the county court had no jurisdiction of the proceeding against the relator, as the jurisdiction of that court is confined by statute to the trial of misdemeanors only.

The proceeding seems to have been instituted under section 4167 of the Revised Code, which provides that "any sheriff who fails to execute a writ of arrest, from the want of due diligence, to be determined by the court, may be fined one hundred dollars, or less, on one day's notice; and if such fine is not paid, may be imprisoned in the county jail for not more than two months."

The following facts, we think, clearly show that this section of the Code was never intended to apply to the county court, and confers no jurisdiction upon it, viz.: The section is found in article 4, chapter 8, of the Code, which chapter relates exclusively to "*proceedings in the circuit and city courts*;" constables are not included in its provisions and made liable to its provisions, who, alike with sheriffs, are authorized to execute warrants of arrest returnable to the county court. Process of

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arrest of the county court is styled by the Code "*warrant of arrest*," and not "*writ of arrest*," the latter term being applied to process of arrest from the circuit or city court issued after indictment found in said courts.

But it is contended by counsel that an inherent power exists in all courts to punish for a contempt of its authority; that this power, although restricted by our Code, is recognized by it as being vested in all the courts of this State; that the proceeding in question was naught but a proceeding to punish for a contempt, and that the court having jurisdiction for that purpose cannot be legally arrested in its action by the writ of prohibition.

Section 4167 of the Code was not intended to provide a mode of punishment for a contempt of the process of the court. Previous provisions of the Code had covered the whole ground upon the subject of contempts of court. But that section was intended to provide for the summary infliction of a penalty upon a sheriff, who, "from the want of due diligence," had failed to execute a writ of arrest. In the proceeding against the relator no question of contempt was involved; it was simply an effort on the part of the county solicitor to recover, for the use of the county, a penalty alleged to have been incurred by the relator "*from the want of due diligence as sheriff*." If, however, as contended, a contempt was involved in the proceeding, the court was exceeding the bounds of its jurisdiction, and the writ of prohibition "lies against inferior tribunals, when, in handling matters clearly within their cognizance, they transgress the bounds prescribed to them by the laws." 3 Bla. Com. 112; *Ex parte Greene & Graham*, 29 Ala. 52.

No statute exists providing for the infliction of a penalty upon sheriffs and constables for failing to execute warrants of arrest returnable to the county court, from the want of due diligence; and perhaps some legislation is necessary upon that subject.

The relator, having no other adequate remedy, is entitled to the relief he asks.

Let the judgment of the circuit court be reversed, and a peremptory writ of prohibition be issued from this court, as prayed for by the relator. Let no costs be imposed upon the judge of the court to whom the prohibition is issued.

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[Kerley v. Vann.]

Kerley v. Vann.

Application to set aside Judgment of Affirmance and reinstate Cause upon the Docket.

Bill of exceptions; parties cannot dispense with signature of judge. — Neither the written consent of parties, nor a joinder in error, can impart validity to an unsigned bill of exceptions; and where parties knowingly submit a cause in this condition and the judgment below is affirmed, the affirmance will not be set aside and the cause reinstated upon the docket and a *certiorari* awarded to bring up a bill of exceptions, to be signed by the judge in pursuance of an agreement of the parties.

THIS was an application, made at the last term, to set aside the judgment of affirmance then rendered, and to reinstate the case upon the docket, &c.

RICE, JONES & WILEY urged, in support of the application, that as the appeal gave jurisdiction, and the parties believed that consent of counsel was as valid to cure omissions in a bill of exceptions as in other parts of the record, although mistaken in this, that the case was one in which the discretion of the court should be exercised to relieve the parties from the effects of their common mistake.

PER CURIAM. — The judgment below in this cause was rendered at the Spring term of the circuit court in 1873; and the appeal from it to this court was taken to the June term of this court of the same year, 1873.

The bill of exceptions was not signed by the circuit judge, though it was agreed that he might sign in vacation, the writing found in the record purporting to be such. But not having done so, the counsel of the parties agreed in writing that the intended bill of exceptions might be considered as signed by the judge and treated in this court as duly completed; and thereupon it was sent up as a part of the record, and treated by the counsel on both sides as such, and errors were assigned upon it, and a joinder in error entered.

At June term, 1874, this court affirmed the judgment below, on the ground that the writing considered as a bill of exceptions was not, and could not be made such by agreement of parties, and that the record proper of the cause showed no error.

Application was afterwards made by appellant's counsel to have the judgment of this court set aside, the submission of the cause vacated, and the cause reinstated on the docket, and continued for the amendment of the record below, so as to put the parties in a situation for a hearing upon the merits.

The condition of the record was well known to counsel on

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both sides, and they have chosen to take the judgment of the court upon it as it stood. The reasons shown for the application to set aside the judgment would hardly be sufficient for the granting of a continuance if the cause were now on the docket; much less will they justify the setting aside of the judgment of affirmance and continuance of the cause, and a *certiorari* when the proposed amendment should be hereafter made, if it should be made at all.

The motion is overruled.

Elsberry v. The State.

Indictment for Carrying on Business without License.

1. *Venue; sufficiency of proof as to.* — Where the evidence reasonably conduces to prove the venue, the appellate court will not pass upon its sufficiency, unless that question was raised in the court below.

2. *License under revenue law; taking out, after beginning of year, effect of.* — Under the Revenue Law of 1868, a license taken out and paid for after the first day of the year, and covering the whole of the year, is no protection against an indictment, afterwards found, for acts done in that year prior to the actual issue of the license.

3. *Corporation engaging in business without license; who may be convicted therefor.* — The superintendent or person conducting the business of a corporation — although he does none on his own account, and acts simply as its servant — may be convicted and punished for carrying on such business without license, if neither he nor the corporation had taken out a license.

APPEAL from City Court of Montgomery.

Tried before Hon. J. A. MINNIS.

The indictment, which was found March 24, 1874, charges that appellant and other persons, whose names were to the grand jury unknown, "did engage in or carry on the business of commission-merchants," without license, &c.

The State proved that the "Alabama Warehouse Company" carried on the business of commission-merchants during the months of January and February preceding the finding of the indictment; that said company was a corporation under the laws of Alabama; that defendant was a stockholder therein, and was also its superintendent and conducted its business." It was further proved that the "Alabama Warehouse Company" had not any license for that business during those months, but did take out and pay for such license on the 4th day of March, 1874.

The defendant introduced the license referred to, countersigned by the probate judge, without month or day of date, or any other date than that of "1874." At the top of it is printed MONTGOMERY COUNTY. It authorizes the "Alabama Warehouse Company (by A. F. Elsberry, agent) to transact business as commission-merchants, from January 1, 1874, to

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December 31, 1874, at Montgomery, Alabama, and at no other place." This was all the evidence.

The court gave a general charge to the jury, which is not set out, to which no exception was reserved. The defendant then requested the following charges in writing:—

1st. If the jury believe the evidence, they must find for the defendant.

2d. If the jury believe that the company was a corporation of the State, and took out a license on the 4th day of March, 1874, for that year, and carried on the business of a commission-merchant, and that defendant did not carry on any business on his own or private account, but simply acted as superintendent for said company, then they must find the defendant not guilty.

3d. If the jury believe that Elsberry did engage in or carry on the business of a commission-merchant, but that in doing so he was only acting in the capacity of a servant of the company, — although they may believe he was a stockholder in it, — they cannot find him guilty.

The court refused each of these charges, and the defendant severally and duly excepted.

The refusal to give the charges requested is now assigned for error.

ARRINGTON & GRAHAM, for appellant. — The venue was not proved and the conviction cannot be sustained. 41 Ala. 419; 32 Ala. 557; 27 Ala. 27.

2. The State, after receiving the full price of the license for the whole year, is estopped from prosecuting a citizen to recover a penalty incurred during that same time. *Brent v. State*, 43 Ala. 297; *Charleston v. Corleis*, 2 Bailey (S. C.), 186.

3. This is not a police, but a revenue, regulation. The revenue law requires every "firm, company, or corporation," &c., to take out a license; and for failure to do so the corporation is indictable. 37 Ala. 562. Being a revenue law, it is not the policy of the State to permit a conviction of every person engaged, however remotely, in carrying on the business of a corporation, when the corporation itself can and ought to be indicted.

JOHN W. A. SANFORD, Attorney General, *contra*.

MANNING, J. — It is now insisted here, but the point was not brought to the attention of the court below, that no venue was proved. The answer to this is furnished by the opinion of this court in *Huggins v. The State*, 41 Ala. 393: "There

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was evidence in the court below reasonably conducing to prove the venue. We do not understand the decision in *Frank v. The State* (39 Ala. 670) as going to the extent of holding that this court will pass upon the sufficiency of the evidence of venue, when no question was raised in the court below. That decision pertains to a case when it affirmatively appeared that there was no proof tending to show venue, and to such cases its authority and reasoning must be confined."

2. It is also insisted that the taking out afterwards of a license which relates back and covers the time within which the business was carried on without a license, and the acceptance by the licensing officer of the price of the license, operate to protect a party from punishment in such a case. Such a mode of condonation would probably tempt many a person to experiment in the chances of carrying on business without license, with a view to escape altogether the contribution he ought to make to the revenues of the State. In this cause there is no evidence whatever of such an intention. But the pardoning power in this State is not intrusted to revenue collectors.

3. It is contended, furthermore, that defendant is not the proper party to be prosecuted, but the corporation of which he was a stockholder and superintendent. There are a few cases in which indictments will lie against a corporation. But as such a body is "invisible, intangible, and exists only in contemplation of law," it is the natural persons in and by whom it lives, moves, and operates that the law generally holds responsible for its offences against the public.

This prosecution is under section 111 of the Revenue Act of 1868, and the penalty to be enforced is a fine, and may be confinement in the county jail. To the latter it would be difficult to subject the artificial being called a corporation, however much the case might justify the imprisonment of some-body.

The judgment of the court below is affirmed.

Hensly v. The State.

Indictment for Retailing without License.

1. *Husband; when may be punished for acts of wife.*—The husband may be punished criminally for an indictable offence, not *malum in se*, committed by the wife in his presence and with his knowledge.

2. *Same.*—Where a conviction of the husband is sought on a sale of liquor, without license, made by the wife in his presence and with his knowledge, evidence of similar sales made by her in his presence (although not proof to convict him) is admissible "to illustrate the character of the sale" in the particular case, and to show that it was made by authority of the husband.

3. *Sale; what sufficient to prove.*—In the absence of other evidence, testimony of a witness that he "*bought*" the liquor, is sufficient to prove a "*sale*" of it.

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APPEAL from Circuit Court of Etowah.

Tried before Hon. W. L. WHITLOCK.

The appellant, Randall Hensly, was indicted and convicted under § 3618 R. C. for retailing spirituous liquor without license. One Spurlock, a state's witness, testified that, within twelve months before the finding of the indictment, he went to Hensly's residence, and, in his house and presence, asked his wife for the whiskey, who went to the "smoke-house" near by and got it, returning with it to the shoe-bench, at which witness and defendant remained while she was gone, and there delivered a pint of whiskey to witness in defendant's presence. This witness further testified that "he had, on various occasions, bought whiskey from defendant's wife, at his residence, during said year, in quantities of a quart and above, and during or while witness was getting the whiskey, defendant was knocking about the premises." Another witness for the State testified that "he had often got whiskey from defendant's wife during the year before the indictment was found, at his residence, in quantities from a half pint to a quart and above; that defendant was present on one occasion, and about the premises on the others, but said and did nothing in regard to the sale and delivery of the whiskey."

After this, the defendant moved the court to exclude all the evidence of sales of a quart and over, on the ground that it was illegal, irrelevant, and inadmissible, under the issues. The court overruled this motion and defendant excepted.

The court of its own motion charged the jury, "if they believed, from the evidence, that the wife of defendant sold whiskey in quantities less than a quart, in said county, within twelve months before the finding of the indictment, in the presence or within the knowledge of the defendant, he is guilty as charged." The defendant excepted to the giving of this charge, and requested the court to give the following written charges; each of which the court refused, and to each of which refusals defendant duly excepted.

1. "If the jury believe from the evidence that Spurlock went to defendant's house and asked his wife in his presence for whiskey, and she went to the smoke-house and got it, in a quantity less than a quart, and took it into the house in presence of defendant, and Spurlock took it away, then defendant is not guilty."

2. "The State is bound to prove a sale, and if it has failed to prove what was paid or to be paid for the whiskey, then no sale is proved and the jury cannot find defendant guilty."

The various rulings to which exceptions were reserved are now assigned for error.

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JAMES AIKEN, for appellant. — 1. The evidence does not show such a *presence* of the husband as will raise the legal presumption of *coercion* by him. The wife acted voluntarily in the matter, and defendant had not part or lot in it. 2 Russ. on Crimes, p. 21. The court should at least have left the question of coercion to be passed on by the jury. *State v. Parker-son*, 1 Strobhart, 169.

2. No sale was proved. A current *price* in money is essential to a sale. 2 Bish. Crim. Law, § 993.

3. The evidence objected to was not relevant in any point of view and should have been excluded. 40 Ala. 720.

JOHN W. A. SANFORD, Attorney General, *contra*. — Under the evidence, the law presumes that the acts of the wife were done under the husband's command and with his approbation, and he is answerable criminally therefor. Schouler Dom. Rel. p. 100-1. *Davis v. The State*, 15 Ohio, 72; 1 Bish. Crim. Law, § 452.

2. To *buy* signifies "to obtain by paying a price or equivalent in money." The testimony of the witness that he *bought* the whiskey is uncontradicted. The amount paid is not an element of the offence and entirely immaterial. 2 Bish. Crim. Law § 993.

3. The evidence of other sales was admissible to prove that accused habitually sold liquor, and that he knew and consented to the acts of his wife. *Seibert v. State*, 40 Ala. 60; *Pierce v. State*, 40 Ala. 743.

MANNING, J. — An offence not *malum in se*, committed by a married woman in the presence and with the knowledge of her husband, is presumed to have been committed by his authority, and he is punishable by indictment for it, if it be an indictable offence.

A witness who says that he *bought* spirituous liquor of a married woman in the presence of her husband, in quantity less than a quart, testifies thereby that she *sold* it to him in the presence of her husband. The terms "buy" and "sell" are the converse of each other, and a witness who says that he *bought* of another a particular article, affirms that the person with whom he dealt *sold* it to him. It is not necessary to say further how much, or what the purchaser paid for the article. If the accused desired explanation in that direction, he should have obtained it by a cross-examination or other evidence. The testimony about other sales of liquor by the wife in the presence of the husband was admissible, for the purpose not of convicting the accused for them, but "to illustrate the character of the sale" to Spurlock as made by the authority of the

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husband. *Pearce v. The State*, 40 Ala. 720. If defendant feared that any other effect would be given by the jury to such testimony, he should have asked of the court a charge thus qualifying it.

The first charge asked was properly refused, because it assumes that the witness did not buy the liquor, as he had testified he did. The second charge asked was also properly refused for reasons hereinbefore indicated.

There is no error in the record, and the judgment of the circuit court is affirmed.

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Indictment for Larceny.

Oath of jury; what recital as to sufficient to uphold conviction. — A recital in the record that the jury, in a criminal case, were "sworn and charged well and truly to try the issue joined," sufficiently shows that the statutory oath was administered to them.

APPEAL from Circuit Court of Talladega.

Tried before Hon. W. H. SMITH.

The only point decided is sufficiently stated in the opinion.

LEWIS E. PARSONS, for appellant, cited *Johnson v. The State*, 47 Ala. 15.

JOHN W. A. SANFORD, Attorney General, *contra*, cited *Crist v. State*, 27 Ala. 137; *McNeil v. State*, 47 Ala. 498.

JUDGE, J. — The only ground of error insisted upon in this case is, that the jury were not properly and legally sworn. The record of the cause shows that they were "sworn and charged well and truly to try the issue joined." In *McGuire v. The State*, 37 Ala. 161, this precise form of oath was held to be sufficient under our statute. See, also, *McNeil v. The State*, 47 Ala. 498.

We can find no error in the record, and the judgment is affirmed.

[Childs v. State.]

Childs v. The State.

Indictment for Retailing, &c., under Revenue Law of 1868.

1. *Indictment under Revenue Law of 1868; sufficiency of.* — An indictment for a violation of § 111 of the Revenue Law of 1868, pursuing the Code form for the kindred offence of retailing without license, and setting forth, in addition, that the business was carried on in a place "not an incorporated city, town, or village," is not bad on demurrer for uncertainty or insufficiency, nor because it charges that the defendant "*was engaged*" in the business of a retailer, instead of charging that he "*did engage*" in such business.

2. *Practice; error without injury.* — Declining to decide upon a demurrer to the indictment until the testimony is closed is a practice not to be encouraged; but such a ruling is not ground for reversal when it appears that the defendant, represented also by counsel, first pleaded not guilty, and then demurred, and afterwards had the benefit of all the points raised on demurrer, on motion in arrest of judgment.

APPEAL from the Circuit Court of Randolph.

Tried before the Hon. J. MCCAULEY WILEY.

The indictment in this case, which was returned and filed in the circuit court of Randolph, omitting caption, &c., charged that before the finding thereof, Simeon W. Childs "*was engaged*" in the business of retailer of spirituous, vinous, or malt liquors, in a place not an incorporated city, town, or village, in said county, without license and contrary to law, against the peace," &c., &c.

The defendant first pleading not guilty, interposed a demurrer to the indictment, — 1st, because it did not charge that the business was done at any place; 2d, because it fails to charge in what quantities the liquor was sold; 3d, because it is vague and uncertain; 4th, because the charge "*was engaged in*" is not equivalent to "*did engage in*."

The court, on its own motion, against the objection and exception of the defendant, declined to determine the demurrer until the evidence was closed, and the State then introduced testimony that in the county, within twelve months before the finding of the indictment, defendant sold liquor in quantities less than a quart and suffered it to be drank about his premises, &c., whereupon the court overruled each ground of demurrer, and the defendant duly excepted. After verdict the defendant moved in arrest of judgment on the same grounds as shown in the demurrer, but the court overruled his motion and sentenced him, and the defendant duly excepted.

C. D. HUDSON, for appellant. — The demurrer should have been sustained. The words "*was engaged in*" are not equivalents of those used in the statute. The defendant is entitled to a reversal because of the singular action of the court upon the demurrer. This court cannot see that appellant was not

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injured by the refusal to decide upon his demurrer until after the evidence was closed. 47 Ala. 15.

JOHN W. A. SANFORD, Attorney General, *contra*. — The delay in deciding the demurrer did not injure appellant. He had the benefit of the same questions on motion in arrest of judgment. *Johnson's case*, referred to, is not similar to this.

MANNING, J. — The prosecution is under § 111 of the Revenue Act of December 31, 1868. It enacts that any person who "*shall be engaged in* or carry on any business," for which license is required, without having obtained one, &c., shall be deemed guilty of a misdemeanor, &c.

The words "*shall be engaged*" is the passive form of the verb, and is equivalent to saying, in the active form of it, *shall engage*. In the same passive form, the indictment responsively affirms that defendant "*was engaged in the business*," &c. This is correct and sufficient. See *Eubanks v. The State*, 17 Ala. 181.

According to §§ 4114, 4115, and 4121, of the Revised Code, and Form No. 30, p. 811, in the kindred offence of retailing without license, the indictment is not obnoxious to the other causes assigned, of demurrer.

It appears by the bill of exceptions that while the cause was before the court, the judge declined to decide the questions made by the demurrer "until the evidence was closed, against the objection and exception of the defendant." This was a departure from correct practice, and ought not to be indulged in. But as the judgment entry shows that defendant came "in person and by counsel, and for plea says he is not guilty, and also demurred to the indictment," &c., it appears that defendant himself did not observe the right order of filing a demurrer before he filed his plea. It appears, also, by the record, besides that, the demurrer was overruled, that defendant had the benefit of the same points sought to be made by it, on a motion in arrest of judgment, and so sustained no injury.

The judgment of the court below is affirmed.

[Fowler v. Williamson.]

Fowler v. Williamson, Garnishee.

Garnishment.

1. *Garnishment; what will authorize suggestion of adverse claim.* — A message to the garnishee from a third person that he "held" a note executed by garnishee, if not known to be a fraudulent pretence, authorizes the garnishee to set up such claim in the answer, or to amend it if already filed.

2. *Contest of answer; when transfer not within issue.* — The garnishee waives the right to set up the interest of the transferee, and is liable to the plaintiff notwithstanding the transfer, if he fails to set it up in the answer; and on contest of an answer which is a general denial of indebtedness, proof of such transfer is without the issue raised, and cannot be received.

3. *Charge; presumption as to correctness of.* — An instruction to the jury, correct or not according to the issue joined, will be presumed to have been correctly given unless it affirmatively appears that the issue joined was such as to forbid the charge.

APPEAL from Circuit Court of St. Clair.

Tried before Hon. W. L. WHITLOCK.

The facts are sufficiently stated in the opinion.

LEROY F. BOX, for appellant. — The statute prescribes the manner in which the garnishee must set up the claim of a third person. When the garnishee makes a general denial of indebtedness, the plaintiff is not put on notice as to any outside claim; has no means of obtaining evidence as to it, and is liable to be surprised on the trial by it. The garnishee ought to be held strictly to the statute or injustice ensues to the plaintiff.

JOHN W. INZER, *contra*. — The suggestion of the claim of Hendrix's son required the plaintiff to bring him in to propound it. Until this was done the plaintiff could proceed no further, and without it the proceedings are void. *M. & O. R. R. Co. v. Whitney*, 89 Ala. 498; Section 2894 R. C.

MANNING, J. — Appellant was a creditor of defendant Hendrix, and had obtained a judgment against him in St. Clair circuit court.

Appellee, Williamson, was summoned to answer as garnishee, in respect to his being indebted to Hendrix, or having any property or effects of the latter in his possession or under his control. He answered at the October term, 1878, of the court, admitting indebtedness to the amount of \$62, but no more, and denying possession or control of any property or effects of Hendrix, &c., &c.

A minute-entry of the same term recites: "Said answer is contested by plaintiff and this cause stands continued." But there is no affidavit, according to § 2974, of the Revised Code, Vol. LII.

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and no allegations showing in what respect or particular the answer was controverted.

At the Spring term, 1874, it appears that plaintiff came, and also the garnishee, "whose answer as garnishee was contested, and issue being joined, thereupon came a jury," &c., who found a verdict in favor of plaintiff for \$45,1 $\frac{3}{4}$ %, upon which judgment is entered accordingly.

From a bill of exceptions taken by plaintiff, it appears that the garnishee amended his answer by stating his indebtedness at \$12, instead of \$62, and that plaintiff then introduced the garnishee and others as witnesses, who prove that before service of the garnishment, the garnishee had bought of defendant Hendrix a tract of land, and executed to him for it three several promissory notes for \$533 $\frac{1}{4}$ each, payable one, two, and three years respectively afterwards; two of which notes (it appears) had been transferred to another person, and the third been put in the hands of a son of defendant Hendrix, who was also a son-in-law of garnishee, and who sent word to garnishee that he *held* the note. There was evidence also that at the time of the sale of the land to garnishee, the land had been levied on to satisfy the judgment of plaintiff, of which garnishee was not then informed; and that after the garnishment was served, he applied to defendant Hendrix for a rescission of the contract and the return of the notes, and that Hendrix obtained the notes back and gave them to garnishee, who executed a deed of the land back to Hendrix.

Several charges were given by the court to the jury and accepted to by plaintiff, which may be resolved into these two:—

First, that the jury could not subject any money which the garnishee may have owed to Hendrix to the payment of the judgment against the latter, except such moneys as he owed when the garnishment was served.

Second, that a message from a third person to garnishee, that he *held* one of the notes, is tantamount to notice that he claimed title to or an interest in it; and when this was disclosed by the testimony on this trial, plaintiff could not proceed further until he had cited such third person and contested the matter with him to subject the amount of the note by his garnishment, even though the jury should believe from the evidence, that the transfer was fraudulently made by Hendrix to avoid garnishment, and the garnishee had reason to believe this, and that transferee was privy to such fraud.

Whether or not the court erred in the first charge, depends upon the scope of the issue that was tried. The terms of the writ of garnishment show that the answer to it must embrace, as that of the garnishee in this cause did, several distinct matters. And the law requires the plaintiff to "allege in what

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respect, the answer is untrue." Rev. Code, §§ 2974. It is important to the garnishee, who has come under no obligation to the plaintiff, and is sought (perhaps, much against his interest) to be coerced into the relation of a debtor to him, that the issue should be specific. If, in this case, the issue restricted the inquiry to what the garnishee owed, at the time the garnishment was served, there was no error in the charge. And as the record does not show what issue was made, we cannot presume that it was one which would make the charge of the court erroneous.

The garnishee would be answerable in a proper case, for money he owed at the time of the answer, or thereafter to become due, as well as what he owed at the time of garnishment served. Rev. Code, § 2944.

In respect to the other question presented, there was manifest error. If garnishee wishes to protect himself against a double liability,—a judgment in favor of the plaintiff in a garnishment, and the claim of a third person to have payment of the same debt made to him,—the statute provides that he may, in his answer, inform the court of such third person's claim, whereupon it will be the duty of the plaintiff, if he does not discontinue his suit, to cite such person to propound and defend his interest. Rev. Code, § 2977. And there is no doubt that a message to a garnishee from a third person, that he held a note which was in controversy in such a case, would, if garnishee did not know it to be a mere fraudulent pretext, justify him in setting up in his answer that such third person claimed title to, or an interest in the note. And this he may do by an amendment of his answer after it is filed. *Foster v. Walker*, 2 Ala. 177.

If the garnishee failed to do this, perhaps he should not be allowed on a trial contesting his answer to make any proof of the transfer of the note by defendant to a third person; but if he may do so, it is certain that he takes upon himself the responsibility of proving, the *onus probandi*, to the satisfaction of the jury, that such transfer was not only made, but made in good faith between the parties, so as to extinguish his indebtedness to the defendant. Plaintiff is not bound to stop the trial, because evidence is produced in the course of it of an alleged transfer, if such evidence may be introduced at all. And certainly, if it shall be shown (as in this case there was evidence tending to show) that the transferee acquired no title to the note by the supposed transfer, plaintiff would be entitled to a verdict and judgment against the garnishee: which would not protect the latter from a suit on behalf of the transferee.

A garnishee cannot be allowed to escape liability under the garnishment, by rescinding a contract by which he became in-

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debted to defendant in attachment, or judgment, any more than by payment of the debt to such defendant, after service of the garnishment.

The judgment is reversed and the cause remanded.

BRICKELL, C. J. — If a garnishee does not in his answer disclose that an indebtedness owing to the defendant in the attachment or in the judgment has been transferred, but relies on a general denial of indebtedness, and an issue is formed contesting his answer, on the trial of such issue there is no contingency in which the garnishee can be permitted to offer evidence of such transfer. The fact of transfer is not within the issue formed, or which can be legally formed. The only fact in issue is, whether when the garnishment was served, or at the time of answer, there was an indebtedness contracted by the garnishee to the defendant, of which the defendant was, when it was contracted, the real beneficial owner. If such indebtedness existed, judgment must be rendered against the garnishee, though it may have been transferred. Such judgment the statute points out the mode of avoiding, which he must pursue. If he does not pursue that remedy, he waives all right to set up the transfer. Justice JUDGE, concurs in this opinion.

Weil *et al* v. The State.

Indictment for Engaging in Business without License.

1. *License, for "engaging in business;" when required.* — It is an essential inquiry in prosecutions for "engaging in, or carrying on business" without license, whether the defendant intended to derive — either directly or indirectly — a profit or means of livelihood from the acts imputed to him. If so, a license is necessary, whether such profit was realized or not.

2. *Same.* — A single act pertaining to a particular business will not constitute the "engaging in or carrying on" the business; yet a series of such acts will.

3. *Charge to jury; what erroneous.* — A charge to the jury to convict, if they believe the evidence, is erroneous, if any material fact is to be inferred and is not a conclusive presumption from such evidence.

4. *Penalty on conviction for engaging in business without license.* — The penalty on conviction for engaging in business without license, under the Revenue Law of 1868, is three times the annual license, and not three times the amount of license from the date of the act done to the end of the year.

APPEAL from Marengo Circuit Court.

Tried before Hon. L. R. SMITH.

The facts are stated in the opinion.

J. T. JONES, for appellants.

J. W. A. SANFORD, Attorney General, with whom was R. H. CLARKE, *contra*.

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[Weil v. State.]

BRICKELL, C. J. — The appellants were indicted in the circuit court of Marengo, for violation of the Revenue Law of 1868. The allegation of the indictment is, that without license, they engaged in, and carried on the business of wholesale dealers in spirituous or vinous liquors. On the trial, but one witness was introduced, and he proved that the defendants were engaged in the business of selling goods and dealing in general merchandise, as merchants in the city of Demopolis, a place of less than five thousand inhabitants. In their store they had dry goods, groceries for family use, whiskey, and a general assortment of goods, — whiskey forming but a small part of the stock. In December, 1873, they sold about \$2,500 worth of goods, and sold and disposed of one barrel of whiskey, — one third of which was sold and about two thirds given away. The sales were to customers in quantities not less than a quart, though any person not a minor could have purchased. Because of the quantity given away, no profit was derived from the sales. Whiskey was given only to those trading in the store. The whiskey was kept for variety, and to accommodate the customers of the defendants. These are the material facts, and the evidence of them was undisputed. The court at the request of the solicitor charged the jury, if they believed the evidence, the defendants were guilty. To this charge the defendants reserved an exception.

The Revenue Law of 1868 declares it unlawful for any person to engage in or carry on any business or profession therein-after mentioned, "without first having paid for and taken out a license therefor." Subsequent sections enumerate the profession or business required to be licensed, fix the price, and declare the mode of obtaining license. Vending spirituous liquors by wholesale or retail is a business for which a license is required. Any person who shall engage in, or carry on any business enumerated, without license, is guilty of a misdemeanor, subject to a fine of three times the amount of the license, and to imprisonment at the discretion of the court.

It is manifest the purpose of the statute is to derive revenue from particular pursuits or occupations. A mere vending of spirituous liquors, in a single instance, or the doing any single act pertaining to any of the enumerated pursuits or occupations, does not require license. It is only when there are repeated and continuous acts, that it can be said the business has been carried on, or engaged in, within the meaning of the statute. The words of the present statute, "engage in, or carry on business," were first introduced into the revenue laws of this State by the law of 1848. They became the subject of judicial construction in *Moore v. State* (16 Ala. 411), which was an indictment charging the defendant with having engaged in, or

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carried on the business of retailing spirituous liquors, without license. The evidence was that the defendant, being a butcher, had, in a single instance, sold five cents' worth of whiskey. The court declaring the evidence would not warrant a conviction, defined the words, "engaged in, or carried on business," as follows: "The terms business and employment as here used are synonymous, signifying that which occupies the time, attention, and labor of men for the purpose of a livelihood or profit. Business is here used in the sense of a calling for the purpose of a livelihood." The decision was followed in *Eubanks v. State* (17 Ala. 181), in which it was held, that an averment in an indictment that a defendant "did keep" a tenpin alley was insufficient. To constitute a violation of the revenue law, the averment should have been that he engaged in or carried on the business of keeping a tenpin alley. The court say: "One may keep a billiard-table, or a tenpin alley for the amusement of himself or his family, without being engaged in keeping them as a business or employment." In the case of *Harris v. State*, January term, 1874, in discussing the point involved in this case, the court accepted the definition of the words "engage in, or carry on business," expressed in *Moore v. State*, *supra*, and said: "It is the business — the occupation or profession — on which the law imposes the tax, and from which it proposes to derive a revenue. Has that business been engaged in, and pursued by the defendant for a profit, or as a means of livelihood? If it has, he should have obtained a license, and failing to do so, is a violator of the law. It is not necessary that it should be the sole or exclusive business or occupation. It may be pursued while pursuing another business, or in connection with another, and in either case the party would be punishable. It is true, the doing a single act pertaining to a particular business will not be considered engaging in, or carrying on the business, yet a series of such acts would be so considered. The true inquiry is, and one which a jury will seldom fail correctly to solve, what was the intent of the party? Was it to derive a profit, or the means of livelihood from retailing, or from any of the other occupations mentioned in the statute? If it was, he is guilty; if it was not, he should not be convicted." Whether actual profit is derived from the acts imputed to the defendant, and which are supposed to be evidence of his having engaged in, or carried on a business, is not a material inquiry. There is no business which may not be so conducted as not to yield a profit. The inquiry is, was it the purpose to derive profit? It may be that profit was not expected from the particular business, but from some other business, which the particular business would increase, and by increasing, the profits would be enlarged. If in the case at bar

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the appellants kept and sold spirituous liquors, in quantities of a quart or more, they would be guilty as charged in the indictment, if from the keeping and sale of liquors, they did not expect a profit otherwise than by an increase of their sale as general dry goods merchants. It is not essential that vending spirituous liquors should have been the principal business of the defendants. It is enough, that it was carried on by them in connection with another business and as an adjunct to such business.

The court, at the request of the solicitor, charged the jury, if they believed the evidence, they should find the defendants guilty. A charge of this kind should be but seldom, if ever, given in any criminal case. It is an invasion of the province of the jury in any case, civil or criminal, unless the evidence is clear, positive, and undisputed. If the evidence is circumstantial, or any material fact is to be drawn as an inference, and is not a legal presumption from it, such a charge is erroneous. In this case, the true inquiry is, what was the intent of the appellants in the acts supposed to be evidence of their being engaged in, and carrying on the business of wholesale dealers in spirituous liquors? That intent, it was the province of the jury to deduce from the evidence. However irresistible the inference may have seemed to the court from the evidence, the jury should have been left free and unrestrained in pronouncing their verdict on it. In giving this charge, the court erred.

The court did not err in sentencing the defendants to pay three times the amount of the annual license, instead of three times the sum they would have been compelled to pay for a license from the time of the sales proved to have been made to the expiration of the fiscal year. The fine imposed by the statute is three times the amount required for an annual license.

It is not necessary to review the several charges requested by the appellants. It is not probable that, on a future trial of the case, they will be requested in their present form.

The judgment is reversed and the cause remanded.

Thrower *et al.* v. The State.

Indictment for an Assault with Intent to Murder.

1. *Officer de facto.*—The official acts of a sheriff, recognized as the lawful officer and discharging his duties without molestation or hinderance, done in the interval between the election and qualification of his successor and the assumption of the active discharge of the duties of the office by him, are valid and binding upon parties to suits, third persons, and the public.

2. *Practice disapproved.*—The court condemns the practice pursued in this case, in regard to the pleadings, as calculated to entail trouble upon the court and produce confusion in the administration of justice.

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[*Thrower v. State.*]

APPEAL from the City Court of Mobile.

The name of the presiding judge is not stated on the record.

The appellants were convicted of an assault with intent to murder. Being arraigned at the term at which the indictment was found, they filed several pleas in abatement, all of which resolve themselves into an objection that the grand jury which found the indictment was not a legal body, because summoned by a person who was not the sheriff. The record is very defectively made up, it being agreed that certain admitted facts in another case should be treated as incorporated in the pleas in this case; but a portion only of the proceedings in it were appended to the transcript sent up on this appeal. It seems however, from the transcript of the two cases, that the error complained of was the sustaining of a demurrer to certain of the pleas in abatement. The facts which by the agreement it was consented should be considered as incorporated in the pleas are fully set forth in the opinion.

No counsel appeared for appellant.

JOHN W. A. SANFORD, Attorney General, *contra*.

JUDGE, J. — The grand jury which preferred the bill of indictment against the defendants in this case, were duly summoned as grand jurors by Rufus Dane, who had been duly elected and qualified as the sheriff of Mobile county, in November, 1871. In the month of November, 1874, Duncan T. Parker was duly elected such sheriff. As the successor in office of the said Dane, he took the oath of office, and filed his official bond, before the grand jury had been summoned by Dane, but had not entered upon the discharge of his official duties. Dane continued in the office, discharging all its duties, without molestation or interference from any quarter, and was recognized as the lawful sheriff, until after the grand jury had been summoned; subsequent to which event, Parker assumed the active duties of the office.

To prevent a chasm in the administration of justice, all the official acts of Dane, prior to the time his successor entered upon the discharge of the duties of the office, in so far as they affect the public or parties to suits, must be regarded as valid; and this on the same principle which recognizes as binding and valid the acts of a sheriff *de facto*. *Garner v. Clay et al.* 1 Stew. 182; *Flournoy v. Clements et al.* 7 Ala. 535.

The above question is presented by the record in an imperfect and irregular manner, — by an agreement of counsel made in the court below to adapt “the pleadings and proceedings

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thereon," in another cause, to this one; a part of the proceedings in which other cause being a statement of facts which it was agreed might "be referred to as facts as if stated in the pleadings," &c. Such a practice is calculated to entail trouble upon the courts, and produce confusion in the administration of justice, and is not to be encouraged.

We have carefully examined the record and can find no error therein prejudicial to the defendants, and the judgment of the city court must be affirmed.

Alsabrooks *et al* v. The State.

Indictment for Living together in Adultery or Fornication.

1. *Evidence; sufficiency of.*—Evidence which is pertinent, and tends to prove the issue, cannot be excluded merely because it is "weak and inconclusive." Its sufficiency is a question for the jury.

2. *Defendants jointly tried; practice as to evidence admissible as to one only.*—Where defendants are jointly indicted and tried, declarations or other evidence criminating one alone cannot be excluded on motion of a co-defendant, because as to him the evidence is mere hearsay. The proper course is to ask instructions to the jury to weigh such evidence only in the case of the defendant against whom it is offered, and to disregard it entirely as to the others.

3. *Evidence anterior and subsequent to offence; when admissible.*—On a charge involving illicit intercourse, during a particular period, evidence of acts anterior or subsequent to that time, which tend to illustrate or explain similar acts within the particular period, although not evidence on which to base a conviction, are admissible in connection with evidence of similar acts during the time laid, to prove illicit intercourse as charged.

APPEAL from Circuit Court of Randolph.

Tried before Hon. J. McCaleb Wiley.

The appellants, William Alsabrooks and Rebecca Bowen, were indicted and convicted for living together in adultery or fornication, on an indictment found at the Spring term, 1873, of the circuit court of Randolph.

On the trial, the State introduced several witnesses who testified to acts of familiarity, circumstances, and conduct, on the part of the defendants, tending to show that within twelve months before the finding of the indictment appellants were living together in a state of adultery or fornication. Some of the witnesses testified that the parties had been seen together in the woods under suspicious circumstances; others that, although the parties lived some twelve or fifteen miles apart, Alsabrooks' horse was often seen tied near Bowen's house, early in the morning and late at night. The court refused to exclude the testimony from the jury, on the separate motion of each defendant, who objected to it on the ground that it was "weak and inconclusive," and the defendants duly excepted.

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Afterwards the State introduced a Mrs. Bowen, who testified, against the objection and exception of defendants, that the defendant Bowen called on witness in the fall of 1871, and about three weeks before her confinement, to wait on her as midwife; that witness refused unless her fee was secured, whereupon defendant Bowen said that Alsabrooks would pay it; that witness waited on defendant Bowen at her confinement, who told her that she would send her fee by Alsabrooks, who shortly afterwards brought it to the witness.

Before the argument to the jury had commenced, the defendant Alsabrooks moved to exclude the evidence of Mrs. Bowen from the jury because it was, as to him, mere hearsay. The court refused this motion, and Alsabrooks duly excepted.

The State then introduced one McKleroy, deputy sheriff, who testified that after the *capias* was put in his hands, he went to Bowen's house before day, and found Alsabrooks there; that Alsabrooks was in his shirt sleeves, and his coat and vest on a chair near the bed where the woman Bowen was lying; that there were only two beds in the room, and one was occupied by children. The defendants moved to exclude this testimony from the jury, "because it related to a period subsequent to the finding of the indictment, and no indecent act of familiarity had been proved against them during the period covered by the indictment." The court overruled this motion, and the defendants duly excepted. The court, of its own motion, then charged the jury, that "they might look at all the acts, permitted by the court to go in evidence, and determine from them whether or not the defendants were guilty of living together in adultery as charged in the indictment." To the giving of this charge the defendants duly excepted.

The defendants then asked the court to give the following charge in writing: 1st. "Unless the State has shown, by evidence, some act of indecent familiarity between the defendants within the period covered by the indictment and before Mrs. Bowen was introduced as a witness, her testimony must not be regarded."

This charge the court refused, and the defendants duly excepted.

The several rulings of the court to which exceptions were reserved, are now assigned as error.

C. D. HUDSON, for appellants.

JOHN W. A. SANFORD, Attorney General, *contra*.

JUDGE, J. — The offence for which the defendants were indicted "consists of a repetition of acts, or includes a continuation of acts rarely susceptible of direct proof."

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On the trial below many acts of the defendants were proved, tending to show illicit intercourse between them, during the period covered by the indictment. The defendants separately moved to exclude all this testimony, because it was "weak and inconclusive;" which motion was overruled. In this the court committed no error; for wherever evidence is pertinent and tends to prove the issue, it is competent. Its sufficiency is a question exclusively for the determination of the jury.

II. The declarations proved by the witness, Mrs. Bowen, were competent evidence against the female defendant Bowen, and the fact that the defendant Alsabrooks paid the fee of the midwife, was competent evidence against him. Instead of moving to exclude the evidence from the jury, the defendant Alsabrooks should have requested the court to charge the jury, that the declarations of his co-defendant were not to be taken as evidence against him, and that he could not be convicted except upon evidence *aliunde*, sufficient to establish his guilt. It is the settled law of this State that in a case "involving a charge of illicit intercourse within a limited period, evidence of acts anterior to such period may be adduced in explanation of acts of a similar character, within that period, although such former acts, if treated as an offence, would be barred by the statute of limitations." *Lawson & Swinney v. The State*, 20 Ala. 65. Such evidence is only admissible, however, when proposed in connection with, or subsequently to the introduction of evidence tending to establish an improper intercourse between the parties during the time covered by the indictment, as was done in this case.

III. The testimony of the witness McKleroy, as to facts occurring subsequent to the finding of the indictment, was admissible in evidence on the same principle.

The court did not err in the charge given, nor in the refusal to charge as requested.

The judgment must be affirmed.

Williams & Youngblood v. The State.

Indictment for Larceny.

Charge to jury; what erroneous.—It is error to charge the jury in a criminal case that, "although they may have a reasonable doubt of any single fact in the testimony of any witness, they cannot acquit unless such fact is material to the issue joined."

APPEAL from Circuit Court of Pike.

Tried before HON. J. McCaleb Wiley.

The appellants were indicted and convicted for the larceny
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of two "yearling cattle." The testimony for the State tended to show that appellants, passing by the prosecutor's field, turned the yearlings in with a drove of their own cattle and sold them in Montgomery. The identity of the cattle, seen in the drove, which some of the witnesses testified belonged to the prosecutor, was one of the material issues on the trial; and there was some conflict between the witnesses for the State and those for the defence as to the marks and peculiarities by which the yearlings were sought to be identified.

Various exceptions were reserved to the ruling of the court below, but it is only necessary to refer to one of them. The court, at the request of the solicitor, charged the jury "that although they may have a reasonable doubt of any single fact in the testimony of any witness, they cannot acquit unless such fact is material to the issue joined." To the giving of this charge the defendants excepted, and it is here assigned for error.

N. W. GRIFFIN and JOHN D. GARDNER, for appellants. — The charge given is manifestly erroneous. Its evident tendency was to mislead the jury. How were they to determine what fact was material to the issue joined? A fact about which they had grave doubts, the existence of which would require an acquittal, might be thrown aside by the jury because they deemed it immaterial, when if they were charged that it was material, they would acquit.

JOHN W. A. SANFORD, Attorney General, *contra*.

JUDGE, J. — The charge given cannot be sustained. It had the effect of withdrawing from the consideration of the jury material evidence upon which the defendants relied to make good their defence, in this: it made their guilt turn upon the single question as to whether the jury might have a reasonable doubt upon "any single fact in the testimony of any witness;" and if they should have such doubt, they were told that they "could not acquit," unless such fact was "material to the issue joined." *Holmes v. The State*, 23 Ala. 17. Furthermore, the charge erroneously left it to the jury to determine whether or not any of the facts in evidence in the cause were material to the issue joined; and besides, not asserting a correct legal proposition, it was calculated to mislead the jury to the prejudice of the defendants.

We deem it unnecessary to pass upon the other questions presented by the record, as they may not again arise on another trial.

[Covington County v. Dunklin.]

For the error we have pointed out, the judgment must be reversed and the cause remanded. The defendant will remain in custody until discharged by due course of law.

Covington County v. Dunklin & Steiner.

Suit against County on audited and allowed Claim.

County ; for what cannot be sued.— Suit cannot be maintained against a county on a claim which has been audited and allowed without reduction. The only remedy is by *mandamus* to compel the levy of such tax, as the law permits to be levied, to pay the claim. (Overruling *Randolph County v. Baldwin*, 46 Ala. 397.)

APPEAL from the Circuit Court of Covington.

Tried before Hon. J. McCaleb Wiley.

The opinion sufficiently states the facts.

W. D. ROBERTS, for appellant. — *Marshall County v. Jackson County* (36 Ala. 613), although virtually overruled by *Randolph County v. Baldwin* (46 Ala. 397), is sound law, and ought to be reinstated.

JUDGE & HOLTZCLAW and WHITEHEAD, *contra.*— *Randolph County v. Baldwin* (46 Ala. 397) overrules the former decisions.

BRICKELL, C. J. — The question which seems from the record to be decisive of this cause, was presented by the demurrer to the special count, averring the cause of action to be a claim against the county, which had been audited and allowed by the court of county commissioners. That question was before the court in the case of *Marshall County v. Jackson County* (36 Ala. 613), and after careful consideration, it was declared such a claim was not the subject of a suit against the county. The statutes do not permit any other decision. Counties are not subjected to a general liability to suit. The cases in which suit against them is authorized are specified in the statute. The specification of the statute, so far as this case is concerned, is, that "no suit can be brought against a county until the claim or demand has been presented, within the time limited by section 909, to the court of county commissioners, and either disallowed or reduced by such court, and refused by the party." The claim, so far as disclosed by the count, had not been disallowed or reduced, but had been audited and allowed. If the claim is audited and allowed, the only duty resting on the county is by taxation to raise the funds necessary for its payment. An ordinary action at law is not the

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remedy to enforce the performance of this duty. *Mandamus* is the only remedy which can compel its performance. *Tarver v. Commissioners' Court*, 17 Ala. 527. That remedy would be the only mode of enforcing a judgment against the county, and is maintainable after the commissioners' court has audited and allowed the claim. The law prescribes the order in which claims against the county are to be paid. A judgment against the county cannot disturb this order of payment, or take precedence of other claims which have been registered and filed. There is no aspect in which there is a necessity for suit on a claim which has been audited and allowed; and as is said in the case to which we have referred, there is a manifest propriety in prohibiting it. The case of *Randolph County v. Hutchins* (46 Ala. 397) supports this action, and was doubtless the authority on which it was instituted; but it is in conflict with the previous case of *Marshall County v. Jackson County*, *supra*, and must be overruled.

The judgment is reversed and the cause remanded.

JUDGE, J., not sitting.

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Indictment for Forfeiting Recognizance under Act approved Dec. 17th, 1873.

1. Act "to regulate confinement and discharge of persons charged with misdemeanor;" *constitutionality of*. — The subject of the "Act to regulate the confinement and discharge of persons charged with misdemeanor," approved Dec. 17th, 1873, is sufficiently clear and comprehensive, within the meaning of section 1, Art. IV. of the constitution, to authorize all the provisions of the act.

2. *Same; indictment under, what need not state*. — An indictment under the act for wilfully failing to appear and answer, after being released "without security," need not allege that the defendant was informed by the officer discharging him of the penalty for a failure to appear, nor that the recognizance was formally forfeited.

3. *Verdict; what sufficient to authorize sentence*. — A verdict which merely ascertains the defendant's guilt, without more, is properly construed to mean guilty as charged in the indictment, and authorizes sentence accordingly.

APPEAL from Marengo Circuit Court.

Tried before Hon. LUTHER R. SMITH.

The appellant, Alfred Giles, was indicted and convicted for the wilful failure to appear and answer a criminal charge, after being released "on his own recognizance, without security."

The indictment, omitting the caption, &c., charges, that before the finding thereof, the defendant was arrested by one Moanier, a duly qualified marshal, by appointment of a named notary public, on a warrant issued by said notary public charging said defendant with petit larceny; that he was discharged,

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at the time the arrest was made, by the marshal, upon his own recognizance, without security, to appear before the notary public at a place and time named, to answer the charge, and that "he did wilfully fail to attend" at the office of the justice as required, to answer the charge as required by law, "against the peace," &c.

The defendant demurred to the indictment:—

1st. Because it did not show that any officer notified defendant of the penalty for failing to appear.

2d. Because it did not show that any forfeiture had been taken upon defendant's own bond.

3d. Because the act under which the indictment is found is unconstitutional and void.

4th. Because no offence is charged by the indictment.

The court overruled the demurrer, and the case was then tried by the jury, who returned a verdict as follows: "We the jury find the defendant guilty." The defendant moved in arrest of judgment on the ground that the verdict was too uncertain to authorize sentence, and did not ascertain of what offence he was found guilty; but the court overruled the motion, and sentenced defendant accordingly, who now brings the case here by appeal, and insists upon the overruling of the demurrer and the denial of the motion in arrest of judgment as errors fatal to the judgment and sentence of the court below.¹

EUGENE MCCA, for appellant. — 1. The indictment should show that the recognizance had been forfeited. That is the highest and best evidence of the failure to appear. It was not the intention of the law that the failure to appear, of itself,

¹ The act under which this indictment was found is as follows:—

"AN ACT

"To regulate the confinement and discharge of persons charged with misdemeanor.

"SECTION 1. *Be it enacted by the General Assembly of Alabama*, That any person who is arrested, charged with a misdemeanor, and is held to answer the same, or who is arrested by virtue of a *capias* or (on ?) an indictment for a misdemeanor, shall be discharged by the committing magistrate, or officer making the arrest under a *capias*, on his own recognizance, without security; and if such person so discharged shall wilfully fail to attend and answer such charge, as required by law, he shall be guilty of a felony, and on indictment and conviction shall be confined in the penitentiary not less than one nor more than two years: *provided* that any person who is discharged under the provisions of this act, who shall be arrested during the period of such release from custody, charged with another misdemeanor, committed after such release, shall not be discharged without giving bond, as now required by law; and such person, if convicted on the trial of said second offence, shall be punished by imprisonment in the penitentiary, not less than one nor more than two years; that any person discharged by an officer of the law, under the provisions of this act, upon his own recognizance, shall be informed by said officer of the penalty attaching upon his failure to appear on trial, and the duty of giving this information is hereby made a part of the duty of the sheriff or other officer, under his official oath.

"Approved December 17, 1873."

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should be *prima facie* cause of indictment. Suppose the judge or magistrate, after forfeiture, should set it aside, or before forfeiture, being satisfied that the absence was not wilful, should refuse to enter judgment of forfeiture, could it be the purpose of the lawgivers that the party should afterwards be liable to indictment? The indictment should show beyond doubt every legal element of defendant's guilt, and where the law provides a specific means for ascertaining one of those elements—to wit, *the forfeiture of the recognizance*—it should be expressly averred.

2. The act is clearly unconstitutional. The title of the act does not foreshadow any such provisions as those which make it a penitentiary offence to fail to appear after being discharged. These provisions are entirely foreign to anything fairly within the title.

JOHN W. A. SANFORD, Attorney General, *contra*.—1. The indictment pursues strictly the terms of the act, and clearly sets forth every element of guilt under the statute. 1 Bish. Crim. Pro. § 267, and note.

2. This is not a case where it is necessary to negative the exception to make out the offence; none of the *provisos* exempt the defendant from punishment. *Comm. v. Hart*, 1 Leading Crim. Cases, 250; *Davis v. State*, 39 Ala. 520.

3. The act is not unconstitutional. *Ex parte Pollard*, 40 Ala. 77.

JUDGE, J.—The validity of the act under which the indictment was found is assailed, on the ground that it is obnoxious to the second section of the fourth article of our state Constitution, which declares that “Each law shall contain but one subject, which shall be clearly expressed in its title.” This position is untenable. The title of the act is “To regulate the confinement and discharge of persons charged with misdemeanors.” The subject named in its title is sufficiently comprehensive to authorize all the provisions of the act. *Ex parte Pollard*, 40 Ala. 77.

The indictment was demurred to, and the demurrer was overruled. This ruling of the court was free from error. The indictment seems to have been framed with care, and sets forth the offence as it is defined in the statute with clearness and precision. It was not necessary that the indictment should have contained the negative averment that the defendant was not informed by the officer who arrested him, as he was required to do, in a proviso of the statute, of the penalty he would incur should he forfeit his recognizance. This was matter of defence, and if true, and a good defence, the defendant

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might have availed himself of it on the trial. *Clark v. The State*, 19 Ala. 552.

The notary public and his marshal had jurisdiction in the premises, the one to issue the warrant of arrest, and the other to execute it. Section 13, article VI. State Constitution; Acts 1868, p. 20.

The motion in arrest of judgment was properly overruled. The jury found the defendant "*guilty*." The verdict was properly construed to mean that the defendant was found guilty of the offence charged in the indictment.

There is no error in the record, and the judgment is affirmed.

Killam's Heirs v. Costley, Administrator.

Motion to dismiss Appeal.

Appeal; when motion to dismiss is too late. — A motion to dismiss an appeal for want of a certificate of appeal comes too late after joinder in error, if the case is one of which the supreme court can take jurisdiction by appeal.

APPEAL from Probate Court of Chambers.

J. J. ROBINSON, for motion.

W. H. DENSON, *contra*.

BRICKELL, C. J. — The appellee, having joined in error, now moves that the appeal be dismissed, and the cause stricken from the docket, because there is not a certificate of appeal. The motion comes too late. When the record presents a case of which this court can take jurisdiction by appeal, a joinder in error is a waiver of the certificate of appeal, or of the security for costs, or of any defects therein. 1 Brick. Dig. 103, § 260.

The motion is overruled at the costs of the appellee.

Parks, Brewer & Co. v. Coffey.

Bill for Injunction against Sale under Execution and to prevent Clouds on Title.

1. *De jure government of State during late war.* — The state government, as organized and existing, in all its departments in Alabama, during the late war, was its rightful *de jure* government.

2. *Same; proceedings of courts of.* — Judgments and proceedings of its courts, which during that time formed a portion of that government, not violative of the Constitution and laws of the United States, or infringing upon the state Constitution, are valid and binding.

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3. *Same; validity of sale since war under judgment during war.* — A sale of land under a *pluries* execution, issued since the war on a judgment rendered during the war, is valid, and will pass the title of the defendant in execution; and he not questioning the validity of the process, a third person cannot collaterally attack a sale under the execution, on the ground that *scire facias* was necessary to authorize execution.

4. *Priority of right between purchaser at execution sale and attaching creditor.* — When an *alias fi. fa.* issues, followed up, without the lapse of a term, by a *pluries* execution under which a sale is made, the purchaser's title is superior to the lien of a creditor who attached the land in the interval elapsing between the issue of the *alias fi. fa.* and the sale under the *pluries* execution.

APPEAL from Chancery Court of Jackson.

Heard before Hon. R. L. WATKINS.

The facts are fully stated in the opinion in chief and the response to the application for a rehearing.

WATTS & TROY, for appellant. — 1. From 1865 to 1868, it was conceded by every department of the state government of Alabama that executions issued on judgments rendered during the war were valid. *Foster v. Moody*, January term, 1873.

2. The supreme court of the United States has repeatedly held that the transactions of courts and legislatures of the seceded States, in regard to domestic questions, and not violative of the Constitution and laws of the United States, are as binding and valid upon citizens of those states as if there had been no war. *Texas v. White*, 7 Wallace, 700. On principle it is difficult to see how it could be otherwise. The authority of no respectable publicists can be found to the contrary.

3. A sale under the execution of appellee would create a cloud on appellant's title which equity will prevent by an injunction. *Martin v. Hewitt*, 44 Ala. 459; *Peebles v. Mobile & Girard Railroad Co.* 47 Ala. 317.

4. The lien of execution attaching before the creditor's lien arose, and being kept up until the sale, confers rights superior to those of the attaching creditor, accruing in the interval.

JOHN D. BRANDON, *contra.* — Execution issued on a judgment rendered during the war created no lien. *Shaw v. Lindsay*, 46 Ala. 290. Such a judgment does not stand on any higher ground than a foreign judgment. *Martin v. Hewitt*, 44 Ala. 459. It can be enforced only by the law of comity, and except as evidence such a judgment cannot operate beyond the limits of the country in whose courts it was rendered. Story, *Conflict of Laws*, § 609.

2. No execution can issue on such judgment, until after a second suit and judgment in the *forum* in which it is sought to be enforced. *Dimick v. Brooks*, 21 Vermont, 569; 44 Ala. 419.

3. None of the cases heretofore decided in this court militate

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against these views. No lien having been created by the executions under which appellants claim, and appellee's rights having accrued before a sale to them, he has a perfect right to sell, and the court below properly denied the relief prayed by the appellants. None of the decisions of the supreme court of the United States have gone so far as to hold that a different effect will be given to *war judgments* than that accorded by the government within whose jurisdiction they are sought to be enforced.

MANNING, J. — Appellants are in possession of, and purchased the land which is the cause of this suit, in December, 1866, at a sheriff's sale under a *pluries* writ of execution upon a judgment of the circuit court of Jackson county, rendered in 1861, during the late war, against Wallace and Chitty. The land belonged to defendant Chitty. A writ of execution, on which the costs and interest were made, was issued on this judgment in 1862; another was issued June 28th, 1866; and next in order to this, without the lapse of a term, was the *pluries* writ, under which the sale was made.

Appellants claimed the land under another title also. In March, 1866, it was attached by the sheriff of Jackson county by virtue of a writ of attachment in a suit of Falls & Cunningham against Wallace & Chitty, in which judgment was rendered, in 1867, in favor of plaintiffs. And appellants show a sheriff's deed to them, as purchasers of the same land under this judgment also.

The appellee, who was defendant below, had caused this same land to be attached in September, 1866, under a writ of attachment in a suit of his own against said Chitty, and having afterwards obtained a judgment therein, he was pressing a sale of the land under an execution upon that judgment.

The bill in this cause was filed by appellants for an injunction against this proceeding, and to remove the cloud it cast upon their title. And as under the decisions of this court, after the reconstruction of it in 1868, judgments rendered during the war were held incapable of sustaining executions on them, and of creating liens upon property after the war, the struggle of the parties to this cause was, on the part of appellee, to assail the title of appellants under the second judgment, rendered after the war, and on the part of appellants, to maintain that title. It is not necessary, however, to review the evidence relating to this contest (which occupies a large part of the record), if, under the later decisions of this court, and in our opinion, judgments rendered during the war are not for that reason invalid.

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For the appellee, it is insisted that, according to the decisions of our immediate predecessors, judgments rendered in the courts of Alabama during the war are to be considered as having no higher authority than the judgments of foreign courts; of which, as such, execution could not be had in our courts. Such decisions were made, but they were afterwards modified by the same, or some of the same judges who made or concurred in them.

The times, indeed, were not then favorable to the formation of correct opinions. Everything was disestablished. The Confederate government with all its departments, offices, and great powers, had gone down before men's eyes, and was seen no more. The state governments were prostrated, and military administrations were set up in their stead. To these succeeded civil governments that had been solemnly instituted by delegates from the people assembled in conventions. These, also, were overturned and denounced as illegal, by the acts of Congress known as "the reconstruction laws," and others were constituted to take their places.

We are referring to events, not criticising them. It does not come within the scope of our duties on this bench to pass judgment on the conduct or policy of any of the actors in those tragic scenes. But there was a general instability of the most inviolable institutions of society. And in the conflict of passions and interests producing it, principles became indistinct, and the minds of men possessed by lawless and revolutionary ideas.

That a much greater amount of evil than that which we have hitherto suffered did not result from this condition of things, is largely due to the moderation, wisdom, and learning of the supreme court of the United States. The influence of its action has been felt in all the courts of the land. And it is by the light which that tribunal has shed upon the subject, that we propose to proceed in our investigations of the questions: What authority is due to the judgments and decrees of the courts of Alabama rendered during the war? and What was the *status* of those courts?

In 1867, the case of *Walker v. Villavaso* (6 Wall. 124) came before that court. The facts concerning it were these: In 1861, Louisiana had (according to the report of the case) "passed an ordinance of secession from the Union, adopted the constitution of the rebel states, required all office-holders to swear allegiance to it, and had been proclaimed in a state of insurrection by the President of the United States." After this, in October, 1861, a decree for the foreclosure of a mortgage, and sale of the mortgaged property, was made by a district court of that State. In 1867, after the war was over, this

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decree was affirmed by the supreme court of Louisiana, then reconstituted and a loyal court. In the supreme court at Washington, it was insisted that it must take judicial cognizance of the facts mentioned, which (as it was urged) made the decree of the district court void, as that of an insurrectionary court, under a political organization hostile to the United States, and so must judicially know that the appellate court of Louisiana, in affirming that decree, decided adversely to the proposition, that it was void for that reason; wherefore the supreme court of the United States should take jurisdiction of the cause. But it held in a brief opinion, that this matter not appearing by the record to have been in controversy below, the cause could not be brought before it under the Judiciary Act of 1789, and it was, therefore, dismissed. This left the original decree below (rendered when Louisiana, as one of the Confederate States, was waging war against the federal government) to be carried into effect, upon the recognition and affirmance of it as valid, after the war, by the supreme court of Louisiana.

At the same term (December, 1867) of the supreme court, at Washington, the question came up in a different form, in *White v. Cannon*, 5 Wall. 443. This also was from the supreme court of Louisiana. But this time it was that court, and not the inferior one, that was the "rebel court." And it had, after the ordinance of secession of Louisiana had been passed, reversed the judgment of an inferior loyal court, and rendered a different one in its stead. Upon the argument of it at Washington, it was suggested to the court that the decree of the appellate court below was void, because rendered after the secession of Louisiana from the Union. But the supreme court of the United States, after reviewing the case, affirmed the decree, and briefly said in conclusion: "The objection that the decree of the supreme court of Louisiana is to be treated as void because rendered some days after the passage of the ordinance of secession of that State, is not tenable. That ordinance was an absolute nullity, and of itself alone, neither affected the jurisdiction of that court, or its relation to the appellate power of this court."

At the next term came up the great case of *Texas v. White*, to which we shall recur hereafter.

In June, 1871, in the circuit court of the United States, at Mobile, Mr. Justice Bradley of the supreme court presiding, the case of *Lockhart et al. v. Horn, Ex'r, et al.*, came up for consideration. This was a suit on the equity side of the court, to set aside a will which had been established in a probate court of Alabama, and for the settlement of an administration.

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In his opinion in the cause, Justice BRADLEY said: "The complainant relies on several grounds for the suspension of the limitation: first, the fact that civil war was raging in Alabama and other States, from January 11, 1861, when the act of secession was adopted, to the close of hostilities and restoration of order, in the summer or fall of 1865. I do not agree that this was a sufficient ground for the suspension of legal remedies and acts of limitation, as between the citizens of Confederate States, any more than it would be as between citizens of States which adhered to the general government. It is a fact, that the courts of Alabama were open to all the citizens of the Confederate States, and there was no law to prohibit them from resorting thereto. . . . Unless a country is actually occupied by hostile forces, and its laws and courts are suppressed, it would be giving to the courts too large a discretion, to allow them to decide when and when not the statutes of limitation are in operation, as between their own citizens."

Having, after reviewing all the grounds, decided that complainants were not excusable for not having brought suit during the war in the courts of Alabama, and were therefore barred of a part of the relief they claimed, the learned justice had next to meet the question of the liability of the executor for funds of the estate which, in 1864, he had invested in bonds of the Confederate States. In reference to this, he says: "As a general rule, in my judgment, all transactions, judgments, and decrees which took place in conformity with existing laws, in the Confederate States, between the citizens thereof, during the late war, except such as were directly in aid of the rebellion, ought to stand good. The exception of such transactions as were directly in aid of the rebellion is a political necessity, required by the dignity of the United States government, and by every principle of fidelity to the Constitution and laws of our common country."

Having decided that the investment in Confederate bonds was directly in aid of the rebellion, and that therefore the executor could have no benefit from that act, the final question was, whether the executor should be liable for the funds he had so invested as good money, or for their value at the time, as Confederate treasury-notes, he having received them in payment, as the currency then in use. It appeared that the executor took office in March, 1858; that the debts from which those funds arose were due before the war began; and that he was urged and cited to settle the estate in August, 1860, and again in January, 1861; and "he has not shown" (says Justice BRADLEY) "sufficient excuse for not collecting the funds of the estate before the war commenced. Had he shown such

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excuse, I should have felt bound to charge him only with the value of the funds at the time when he received them, with a reasonable allowance of time for making a settlement."

"It may be urged" (continued the learned justice) "that the decree of the probate court, made in May, 1864, is conclusive on the question of the executor's diligence. . . . But a careful examination of that decree shows that this question was not passed upon by the court. . . . *Had the court* decided the question of diligence, I should have deemed *its decision on that point conclusive.*"

These large extracts are made, because this opinion of Judge Bradley is believed to be not yet published in any book of reports, and because of its great value in showing how fully and emphatically the eminent judges of the highest court in the land acknowledge the validity and authority (when not in conflict with the federal Constitution) of the laws, judicial proceedings, and governmental institutions of the States of the late Southern Confederacy.

In affirming the decree of Justice Bradley, in this case, the supreme court of the United States said: "We admit that the acts of the several States, in their individual capacities, and of their departments of government, executive, judicial, and legislative, during the war, so far as they did not impair or tend to impair the supremacy of the national authority, or the just rights of citizens under the Constitution, are in general to be treated as valid and binding. The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government, or the regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated, precisely as in time of peace. No one, that we are aware of, seriously questions the validity of judicial or legislative acts in the insurrectionary States, touching these and kindred subjects, where they were not hostile in their purpose or mode of enforcement to the authority of the national government, and did not impair the rights of citizens under the Constitution." *Horn v. Lockhart et al.* 17 Wall. 580. In harmony with these declarations of the law is the opinion in *Texas v. White* (7 Wall. 700), as explained in *Huntington v. Texas*, 16 Wall. 402. Quotations to this point, from these cases, are needless, and would too much extend this opinion.

But while the validity and authority of the acts, judgments, and decrees of the several departments of the state governments, during the war, are so fully and emphatically affirmed, it is nowhere expressly held that those governments were, dur-

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ing that period, the rightful, legitimate governments of these States. On the contrary, in *Texas v. White* (*supra*), the chief justice, *arguendo*, says: "The Legislature of Texas, at the time of the repeal, constituted one of the departments of a government established in hostility to the Constitution of the United States. It cannot be regarded, therefore, in the courts of the United States, as a lawful legislature, or its acts as lawful acts. And yet it is an historical fact that the government of Texas, then in full control of the State, was its only actual government; and certainly if Texas had been a separate State, and not one of the United States, the new government having displaced the regular authority, and established itself in the customary seats of power, and in the exercise of the ordinary functions of administration, would have constituted, in the strictest sense of the words, a *de facto* government, and its acts, during its existence as such, would be effectual, and, in almost all respects, valid. And to some extent, this is true of the actual government of Texas, though unlawful and revolutionary as to the United States."

The chief justice then goes on, without intending (as he says) to be full and exact, to speak of the acts of such a government which must be treated as valid, and concludes by saying: "That acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void:" which, accompanied by the explanations made in *Huntington v. Texas* (*supra*), corresponds with what we have before quoted from *Horn v. Lockhart*, 17 Wall. 580.

Of the paragraph above, from the opinion in *Texas v. White*, without adverting particularly to its defective logic, two things are to be noted: First, the learned chief justice had previously mentioned, that the governor and secretary of state of Texas, having refused to take an oath of allegiance to the Confederate States, "were summarily ejected from office:" and since he speaks in the passage of "the *new* government having displaced the regular authority," &c., we must infer that he had in mind this government, referred to as established by actual usurpation, when he was speaking of its *status* and authority; and secondly, all those acts which he says "must be regarded as invalid and void," if done by the "actual government of Texas, though unlawful and revolutionary as to the United States," would have been equally "invalid and void," if done by the lawful and regular government, before secession from the United States.

Hence, no support is afforded by that opinion to the proposition, that the government of Alabama (which was not estab-

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lished by the expulsion of any person from office, and the introduction of a usurper in his place) *was not* the government *de jure* of this State during the war. Other portions of that opinion enable us to demonstrate that it was.

"We have already" (says the chief justice) "had occasion to remark, at this term, that 'the people of each State compose a State, having its own government and endowed with all the functions essential to separate and independent existence,' and that 'without the States in union, there could be no such political body as the United States.'" *County of Lane v. The State of Oregon*, 7 Wall. 76. Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, "but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution, as the preservation of the Union and the maintenance of the national government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

Uttered at a time of stormy excitement, when the obligations and restraints of the Constitution were little heeded, these are noble sentences. Before the war, then, and while in the Union, Alabama was endowed with autonomy. Her people composed "a State having its own government, and endowed with all the functions essential to a separate and independent existence." The persons who exercised this government were elected into it by this people. They were not appointees of any officials of the United States. Their tenure of office did not depend upon any federal functionary. They could not be deposed, or their places supplied, by the action of any one from without the State. In fine, they composed a government, created by the people of Alabama, for the enactment and enforcement of the laws of this people, were responsible for their official acts only to this people, could be succeeded in office only by those whom this people should elect, and possessed, rightfully, *de jure*, all the powers of government, except those which were denied to them by the Constitution of Alabama and the Constitution of the United States.

The rightful government, thus constituted and thus endowed with the powers and faculties of administration, which Alabama had before and when the act of secession was passed, continued without change, except by the regular election or appointment of successors to the persons whose terms of office expired, down to the close of the war. If any of its members ceased to be lawful members of the government, while they acted as such, and became merely *de facto* members of it, or only *actual* members, they were then usurpers of seats of

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authority which belonged to others. Who were those others that were thus expelled, or kept out? Who claimed to be so? Who, if the incumbents had vacated their offices, would have had the right, or claimed that they had the right, to take and occupy them?

These are questions that cannot be answered; and why not? Because the incumbents of those offices were not usurpers of them, but rightfully in possession.

Is there some dim idea, however, existing, that although this be true of the persons exercising authority, yet the state government itself, with its departments and offices, had become defunct? How could this happen?

Whether in the Union or out of it, Alabama did not cease to be a State. Some of her elder sisters were States with their separate and independent governments, before the Union under the Constitution was formed; and any or all of them might continue to be so, if the Union were utterly dissolved. To the political community denominated a State, the organization which we call government is essential; it is of the substance of it, and a part of the idea which the word expresses. And such an organization was certainly quite as necessary to Alabama, while dissevered from her co-states, as while in union with them. This is indeed affirmed, or recognized, in most of the passages which we have quoted from cases in the federal courts. The latest of those in the supreme court, at Washington, relating to this matter, is that of *Sprott v. United States*, decided at the present term. [See report in the January No. 1875, of *The American Law Register*.] MILLER, J., in delivering the opinion of the court, and speaking of the difference between "the so-called Confederate government and that of the States," says: "The latter, in most, if not in all instances, merely transferred the existing state organizations to the support of a new and different national head. The same constitutions, the same laws for the protection of property and personal rights, remained and were administered by the same officers. These laws, necessary in their recognition and administration to the existence of organized society, were the same, with slight exceptions, whether the authorities of the State acknowledged allegiance to the true or the false federal power. They were the fundamental principles for which civil society is organized into government, in all countries, and must be respected in their administration under whatever temporary dominant authority they may be exercised."

Anything more conclusive on this point, it would be both difficult and needless to produce. But we may add, that it having been repeatedly held by the highest court of this coun-

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try, that the acts and ordinances of secession were mere nullities, absolutely void, and all the efforts made in support of them having proved ineffectual, it follows that legally, in contemplation of law, Alabama was never out of the Union. The Constitution and laws of the United States, though their operation was suspended, continued obligatory within her borders, during the whole period of the war. And she continued to be a member of what the Constitution in all its provisions designed to be "an indestructible Union, composed of indestructible States."

Of course, we are not to be understood as holding that because the courts and legislatures of Alabama during the war were such rightfully — *de jure* — therefore, whatever they did must be lawful. Admit, for the sake of the argument, that the persons exercising public functions employed them in doing many illegal acts, even treasonable ones. What then? Concede that they became liable to be, and were, pursued, driven from office, and punished, by the federal government; and that their official acts of the character supposed must be treated as null and void. All this would not prevent the things which they had officially done that were not in violation of superior laws, or of the rights and obligations arising under such laws, from being valid and effectual, any more than the crimes of Charles I. and his decapitation for them, or those of James II., for which England dethroned and expelled him, invalidated the acts which they had lawfully done while they yet actually swayed the sceptre, as kings *de jure* of the realm.

Our conclusion then is, that the courts of Alabama, during the war, were a portion of the rightful government of the State; and that their judgments, decrees, and proceedings, not in violation of the Constitution and laws of the United States, or of any right or obligation arising under them, and not in violation of the Constitution of Alabama, are valid, and must have operation and effect accordingly.

We have before mentioned that the views of our predecessors on this point, as expressed in *Hall v. Hall* (43 Ala. 488), *Powell v. Boon* (Ib. 459), *Martin v. Hewitt* (44 Ala. 418), and in other cases, have been modified by later decisions. We refer to the cases of *Tarver v. Tankersley*, *Powell v. Young*, and *Riddle v. Hill*, decided at the last (June) term of this court, and the opinions therein delivered by BRICKELL, J.

In them it was held, conformably with the opinion of the supreme court of the United States in *Horn v. Lockhart* (*supra*), that "judicial proceedings in this State during the war, so far as they did not impair, or tend to impair, the supremacy of the national authority, or the just rights of citizens under the Constitution, are to be treated as binding."

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This rectification of the judicial opinion of the court gave great satisfaction to the lawyers and people of the State. Its tendency was to prevent litigation from being fomented, and the peace of families from being disturbed. We have gone a step further (we hope with like beneficent consequences), in holding that the courts in which those judicial proceedings were had were a part of the rightful government of the State.

One consequence of this decision is, that no act of the legislature, or ordinance of a convention, is necessary to give validity to the judgments, decrees, and proceedings of those courts.

Another consequence is, that the records and papers of those courts, during the war, are to be preserved with the same care, and certified in the same manner, as those of the courts held since; and like punishments are to be inflicted for the destruction, mutilation, abstraction, or falsification of the records and papers of the one as of the other.

According to our views, the title to the land in controversy, acquired by appellants under a judgment rendered during the war, the executions upon which created a lien commencing at an earlier date than that created by the attachment for appellee, is valid. And the proceedings of the appellee to have the land sold under the judgment in his suit are injurious to appellants, and cast a cloud upon their title.

The decree of the chancellor is reversed, and a decree will be here rendered perpetually enjoining appellee from further proceeding to sell the land in controversy to satisfy his judgment.

Appellee will pay the costs of this suit in this court and in the court below.

BRICKELL, C. J., not sitting.

NOTE BY REPORTER. — At a subsequent day of the term, appellee applied for a rehearing. The argument in support of it did not come into the reporter's hands. The following response was made thereto: —

MANNING, J. — Application is made for a rehearing in this cause, upon a supposed misapprehension by the court of the facts disclosed by the record. And in support of the application it is alleged that it was not averred by the appellants in their bill, or proved, that executions were regularly issued upon the judgment under which the land in controversy was purchased by them, without the lapse of a term.

The judgment in the suit of W. H. Webb & Co. against J. E. Wallace and Dixon Chitty, which is one of those under which appellants purchased the land, was rendered on the 10th day of October, A. D. 1861. Execution was issued on it in

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December, 1862, upon which the sheriff returned that he had "received interest and costs on the within *fi. fa.* April 1st, 1863." An *alias fi. fa.* was issued and delivered to the sheriff June 28, 1866, but not returned by him, and a *pluries fi. fa.* was issued and delivered to the same sheriff October 24, 1866, under which he sold the land, and it was bought by appellants on the first Monday in December, 1866, after having been duly advertised. All this appears by the transcript of the record of the cause, which is made an exhibit to the bill of complaint, as a part of it, and was also put in evidence.

The regularity of the proceedings upon the judgment of Webb & Co. against Wallace and Chitty was never disputed or objected to by either of the latter, and it was the land of one of them (Chitty) which was sold, under the execution, to appellants. If the execution ought not to have been issued without a *scire facias* to revive the judgment, advantage should have been taken of this by the parties, in a direct proceeding. The regularity of the process and proceeding cannot be collaterally assailed by a third person.

Speaking of an authority referred to, in *Stewart v. Nichols* (15 Ala. 230), COLLIER, C. J., said: "The court seemed to assimilate the case before it to a *feri facias* sued out after a year and a day after the rendition of the judgment, which is confessedly not void, but merely voidable by some direct proceeding." And again he said (p. 231): "In such case the judges held that if the execution issued without a *scire facias* after a year and a day, and the defendant did not interpose to set it aside, it was an implied admission that the judgment was unsatisfied and existed in full force." This removed the presumption of payment, arising from the plaintiffs' not taking out execution within a year and a day. See, also, to same effect, *Sellers & Cook v. Hayes*, 17 Ala. 753; *Pollard v. Cocke*, 19 Ala. 188.

The execution issued upon the judgment of W. H. Webb & Co. v. Wallace and Chitty, on the 28th of June, 1866, preceded by nearly three months the attachment of the land in September, 1866, by appellee, and being followed, without the lapse of a term, by the execution of October, gave to plaintiffs in it priority over the attachment. And it was under this latter execution appellants purchased the land.

It is not, therefore, necessary to examine the voluminous evidence relating to appellants' purchase of the same land under the judgment rendered in the case of *Falls & Cunningham v. Wallace & Chitty*, commenced by attachment other than that of appellee. The application for rehearing is denied.

BRICKELL, C. J., not sitting.

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[Northington v. Faber.]

Northington, Administrator, v. Faber.

Trover.

1. *Mortgage; what void.* — A mortgage by the wife of her statutory separate estate, to secure payment of her husband's debt, is void, conferring no title on the purchaser under it, and she, or her personal representative, may maintain trover against the purchaser for the conversion of property thus acquired.

2. *Husband, how becomes indebted to wife and how may secure indebtedness.* — If the husband converts the wife's statutory separate estate, he becomes indebted to her to the amount used, and although insolvent and largely indebted, may secure such debt by a mortgage of property to a trustee for her; and the conveyance, if made *bonâ fide*, is valid against the husband's creditors.

3. *Mortgage to secure wife; what she takes at purchase under.* — Where the wife purchases under the mortgage, at a sale made in pursuance thereof, and a conveyance is executed to her, the legal title vests in her, and such property is her statutory separate estate.

4. *Charge; what should be refused.* — A charge which is not applicable to the evidence, or calculated to mislead the jury, should be refused.

APPEAL from Circuit Court of Autauga.

Tried before Hon. JAMES Q. SMITH.

In an action of trover brought by appellant, Northington, as administrator of Euphrenia Hall, deceased, against appellee, Faber, to recover damages for the conversion of certain personal property, the following state of facts appeared: —

In 1867, Dixon S. Hall, husband of said Euphrenia, executed a trust deed or mortgage to A. G. Smith, as trustee for said Euphrenia, upon the property sued for, which recited that in 1858, he (Hall) had received from the administrator of his wife's father her distributive share of his estate, and had converted it to his own use, whereby he had become indebted to her in the sum of \$3,645. The instrument provided that if the debt was not paid by the first day of January, 1868, the trustee should take possession of the property, and, after due advertisement, sell the same to the highest bidder for cash, for the purpose of paying the debt, &c., and that the trustee shall hold the sum so received for the "sole use and benefit" of the wife, to be invested or disposed of as she might direct in writing. This deed was duly recorded in the office of the probate judge the same year.

The debt not having been paid at maturity, the trustee proceeded to advertise and sell the property in the manner required by the trust deed, and the said Euphrenia, being the highest and best bidder, became the purchaser. The trustee executed a deed to her, dated January 2, 1869, reciting the foregoing facts, which "granted, bargained, sold, and conveyed" to her "all the right, title, and interest," which the trustee had in and to the property, by virtue of the trust deed, "to have and to hold unto her, her heirs, executors, administrators, and assigns forever."

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On the 22d day of February, 1871, said Euphrenia and her husband, Dixon S. Hall, executed a mortgage, attested by two witnesses, upon the property, to Faber & Co., to secure a debt of the husband. This mortgage contained the usual power to take possession of the property, and sell in default of payment. The plaintiff objected and excepted to the admission of the mortgage as evidence. It does not appear from the evidence whether there had been a sale under the mortgage, but the possession of the property covered by it was admitted by appellee, who refused to deliver it upon demand.

It was shown that at the time Dixon S. Hall executed the trust deed he was insolvent, but he testified that he had since paid all the debts in existence at the time of its execution. There was also testimony tending to show the truth of the facts recited in the trust deed, and the trustee's conveyance under it. There was evidence that the said Euphrenia executed the mortgage in defendant's store and expressed no dissatisfaction; but it also appeared that defendant had no conversation with her, and that neither she, nor any one in her presence, made any declarations about it.

Euphrenia and Dixon S. Hall were married in this State in 1857, and she died here in the spring of 1871. Her father was also a resident of this State, and administration was had here upon his estate.

There was much other evidence introduced and many exceptions reserved to the ruling of the court thereon, but the foregoing is all that is in any way material to points decided by the court.

The court below charged the jury, among other things, that "if they believed that Mrs. Hall, by her silence, acts, declarations, or deed, induced Faber & Company to believe that the property embraced in the mortgage was her husband's, and procured credit for him on the faith of it, this was a fraud upon them, and that neither she nor her personal representative could or would be allowed in a court of law to set up a claim to the property against defendant, so as to defeat his title thereto."

This charge was given in a general charge embodying several other propositions of law. The plaintiff excepted to the charge as a whole, and especially to that portion of it which is given above.

This charge, among other things, is now assigned as error.

W. H. & W. T. NORTHINGTON, for appellant. — The case of *Davidson v. Lanier*, June term, 1874, taken in connection with *Bibbs v. Pope*, 43 Ala. 90, and *Wilkinson v. Cheatham*, 45 Ala. 337, settles nearly every question involved in favor of appellant.

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They show that appellant's mortgage was void. The charge excepted to was abstract. Besides, the deed being void, no estoppel will be worked by it. 8 Ala. 543.

ELMORE & GUNTER and C. S. G. DOSTER, *contra*. — The conveyance of the husband and wife, attested by two witnesses, in the manner required by law for the conveyance of the wife's statutory estate, passed the legal title out of her to the defendant. She might go into equity, but cannot recover at law. 37 Ala. 91; 31 Ala. 440; 43 Ala. 190. She alone could exercise the option or election to do this. Having died without making any objection, it is presumed she wished the mortgage to stand, and her administrator cannot now elect for her. This being so, and fatal to the plaintiff's right of recovery, it is immaterial what errors intervened on the trial.

JUDGE, J. — That the wife cannot make a valid mortgage of her statutory separate estate to secure the payment of her husband's debts, is now the settled law of this State; and it is also settled, that every such mortgage is forbidden by law and void. *Bibb & Wife v. Pope*, 43 Ala. 90; *Wilkinson v. Cheatham*, 45 Ala. 337; *Davidson v. Lanier*, June term, 1874.

Furthermore, it was held in the case of *Davidson v. Lanier*, *supra*, that if the husband uses the statutory separate estate of his wife, he becomes indebted to her to the amount thus used, and may pay or secure the debt by a conveyance of property for that purpose; and that, although the husband may be insolvent, and owe other creditors at the time, the wife will be protected in her title thus acquired, both against the husband and the husband's creditors.

The principles settled by these decisions have been too long acquiesced in, and acted upon, to be now disturbed, even though we should doubt their correctness; and an application of them to this case relieves it of all difficulty.

If the conveyance by Hall to the trustee was *bonâ fide* made to secure an actual subsisting indebtedness by him to his wife, incurred by the conversion of his wife's statutory separate estate, its validity can in no way be affected by his having been indebted at the time, to other creditors, beyond his ability to pay; and if such was the character and purpose of the conveyance, when Mrs. Hall became invested with the title to the property conveyed therein, by a sale thereunder, as is shown by the record, it was her separate estate, under the Code of Alabama; and the subsequent mortgage of the property by herself and husband to Faber & Co., to secure the payment of a debt of the husband, conveyed no title or interest to them. If the title of Mrs. Hall had been *bonâ fide* acquired, the mortgage

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was simply a nullity, and it can be successfully attacked as such in any court where a right is claimed under it.

The charge of the court below, excepted to by the plaintiff, that if the jury should believe that Mrs. Hall, "by her silence, acts, declaration, or deed, induced Faber & Co. to believe that the property embraced in the mortgage was her husband's, and procured credit for him on the faith of it," &c., that then they must find for the defendant, was erroneous. The bill of exceptions purports to set out all the evidence introduced on the trial, and we can perceive no testimony which authorized this charge. It was not only abstract, but had a tendency to mislead the jury.

We deem it unnecessary to notice any other questions presented by the record, as what we have said, it is believed, will afford a sufficient guide for the circuit court on another trial.

Let the judgment be reversed and the cause remanded.

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Appeal from Order granting Mandamus.

County taxes; not payable in warrants.—In the absence of a special enactment authorizing it, the tax-collector has no authority to receive warrants on the county treasury in payment of taxes due the county, and there is no provision in the Revenue Law of 1868 which gives such authority.

APPEAL from Circuit Court of Lowndes.

Tried before Hon. J. Q. SMITH.

The appellee, the tax-collector of Lowndes county, applied to the circuit court for a *mandamus* compelling the appellant, as county treasurer, to receive in settlement of the taxes of the county, warrants or orders on the treasury, which appellee had collected. On a hearing, the circuit court awarded the *mandamus*, and this appeal is prosecuted for a reversal of that judgment.

STONE & CLOPTON, for appellant.

ELMORE & GUNTER, *contra*.

BRICKELL, C. J.—The statutes require all claims against counties to be presented to the court of county commissioners for allowance. That court is required to audit such claims, and to register such as are allowed in a book kept for that purpose. The claimant receives a warrant on the treasury for the amount allowed. R. C. § 907-9. The county treasurer is required to register and number all claims allowed in the order of

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their presentment, and he is bound to pay them according to such order. R. C. § 926. The purpose of the statutory provisions is, to define clearly the mode of adjusting claims against counties, and to prescribe absolutely the rights of county creditors, and the preferences and priorities to which they are entitled. It is not in the power of the county commissioners, or of any official, to change this mode of adjustment, or to disturb the priorities and preferences of creditors the statutes create. To prevent all interference by such officials, and to remove from them the opportunities of preferring county claims, because of partiality for, or prejudices against creditors; to avoid the unseemly struggle of county creditors, leading not only to injustice but to official corruption, to procure from the favoritism of the officers priority in payment, was a purpose these statutes propose to accomplish. When a claim has been audited and allowed by the court of county commissioners, it ceases to be the subject of a suit against the county. The only remedy the creditor has for its recovery is a presentation to, and a registration by the treasurer, and then compulsory process against the county commissioners, for the levy of a county tax, so far as they have power to make such a levy, to pay such claims as have been allowed and presented to and registered by the treasurer. *Tarver v. Court of Commissioners*, 17 Ala. 527; *Falkner v. Commissioners' Court*, 19 Ala. 177; *Marshall County v. Jackson County*, 36 Ala. 613. The rights of creditors thus intervening, it may well be doubted whether a legislative enactment could impair or defeat them. Certain it is, that they are beyond the control of the county officials. *Dillon on Munic. Cor.* § 41. These statutes being of force, the tax-collector charged with the collection of the county revenues, which are to pass into the treasury and become the fund pledged to creditors for their payment, in the order of their registration, has no authority to receive anything but money in satisfaction of such revenues. If he could exercise such authority, if he could accept in payment county warrants, or claims of any character, there would be but little necessity for a county treasurer, and the order of payment prescribed by the statute could be nullified, and the creditor left without remedy.

The counsel for the appellee has not controverted this proposition, but insists that the last clause of the 52d section of the Revenue Law of 1868 confers on the tax-collector authority to receive warrants on the treasury in payment of county taxes. The section is devoted to the manner and time in which the tax-collector shall account and settle with the state and county treasurer, and concludes, "and in his settlement with the state and county treasurer, shall pay over all gold and silver, United

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States treasury-notes, national bank-notes, notes issued by any bank under the laws of this State, and the warrants on the state and county treasurers received for taxes; and any collector violating any of the provisions of this section shall be guilty of a misdemeanor." Acts of 1868, p. 314. We do not understand this provision as conferring authority on the tax-collector to receive any particular funds, or any particular claims, in payment of taxes, or as defining what he shall receive. Its purpose is to compel him to pay into the treasuries just what he has lawfully received from the tax-payer; to prohibit him from all change of or speculation with the funds he has received from the tax-payer. If it is to be construed as defining the things the tax-collector may receive in payment of taxes, he has authority to receive "notes issued by any bank under the laws of this State." He could receive the notes of all the suspended banks, issued under the laws of this State, and flood the treasuries, state and county, with an irredeemable and worthless paper, thus clogging the whole administration of the government. The only purpose of this clause is to compel him to pay into the treasuries that which he has lawfully received from the tax-payer. There are many counties in the State in which by special enactment particular claims or warrants on the county treasury are made receivable in payment of county taxes. The object of this clause is to compel him, where such enactment exists, to pay over the warrants he has received, and to prohibit him from using other funds received by him in purchasing or obtaining such warrants and applying them in payment of such taxes, and to render him indictable if he should in this respect violate his official duty.

It is not contended that the county warrants were received by the collector in compliance with any special enactment. His authority to receive them is predicated wholly on the clause of the revenue law, to which reference has been made. That clause did not confer the authority, and the county treasurer properly refused to accept them in settling with the appellee.

The judgment of the circuit court is reversed, and a judgment here rendered dismissing the application for *mandamus*.

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[Ex parte Matthews.]

Ex parte Matthews.

Appeal from Judgment of Circuit Court refusing Mandamus to compel Speaker of House of Representatives to certify Account of Member of General Assembly for Mileage, &c.

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1. *Statute enacted in terms of a former statute which has been construed; presumption as to legislative construction.* — The legislature in reenacting a statute substantially in the terms of a former statute which had been judicially construed, will be presumed to have put that construction upon the statute which the prior act had received.

2. *Session of general assembly; what constitutes.* — The sittings of the general assembly, although extended in the constitutional mode beyond thirty days, and an adjournment takes place for a recess of several weeks, constitute but one session.

3. *Adjournment; resolution as to, force and effect of.* — A joint resolution was adopted by both houses of the general assembly without having been read on three several days in each house or presented to or approved by the governor, providing that when the two houses adjourned on the 17th day of December, 1874, they should stand adjourned until the 15th day of January, 1875: "provided that no member of the general assembly shall be entitled to receive mileage in going to and returning from his home:" *Held*, 1st. It was not necessary that the resolution should be read on three several days in each house, nor that it should be presented to, or approved by, the governor. 2d. The proviso was germane to the resolution. 3d. Under the constitutional provisions in regard to adjournments, the resolution, although not strictly a law, had the force of law, and suspended, as to that adjournment, section 49 of the Revised Code, which, as construed in *Ex parte Pickett* (24 Ala. 91), entitled members to mileage in going to and returning from their homes during recess. 4th. The resolution was binding upon all the members, whether they voted for or against its passage.

APPEAL from Circuit Court of Montgomery.

Tried before Hon. J. Q. SMITH.

The facts are sufficiently stated in the opinion.

RICE, JONES & WILEY for appellant.

JNO. W. A. SANFORD, Attorney General, *contra*.

MANNING, J. — The general assembly convened at the capital in regular session on the third Monday in November, 1874, the time prescribed by law. The Constitution having provided that it "shall not remain in session longer than thirty days, except by a vote of two thirds of each house," a joint resolution prolonging the session was adopted by the Senate and House of Representatives, by a two thirds vote of each body, on the 9th of December following. And on the 11th day of the same month a like resolution passed each house, providing that "when each house of this general assembly adjourns on Tuesday, the 17th day of December, 1874, they shall stand adjourned until twelve o'clock on Wednesday, the 15th day of January, 1875; provided no member of the general assembly shall be entitled to receive *mileage* in going to and returning from his home."

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The petitioner in one of these cases, and the same person, appellant in the other, is a member of the House of Representatives, met with the other members, and was in session with them, and alleging that he did not vote for the resolution of December 11th for a recess, and that during that recess he went to his home and returned from it upon the reassembling of the house in January, claims to have mileage allowed to him therefor.

The Constitution provides that "Each member of the general assembly shall receive from the public treasury such compensation for his services as may be prescribed by law," &c.

By the Revised Code, § 49, "Each member of the general assembly shall receive six dollars for each day's attendance, . . . and be allowed eight dollars for every twenty miles travel in going to and returning from the seat of government," &c.

The session, which began on the third Monday in November, is not yet ended. It will be but one session until the adjournment *sine die*. Upon the reassembling of the two houses at the close of the recess, all their business was in *statu quo*, in the same plight as at the moment of the adjournment on the 17th of December. Bills left on their second or third reading, or referred to committees, so stood when the members came again together, and proceedings were had in respect thereto as if the adjournment had been from the day before. It was a continuation of the regular session begun in November.

The law above quoted, in regard to mileage, seems to contemplate allowance of it for going and returning once only, during each entire session. But upon a provision almost identical in the Code of 1852, this court decided in 1854 (in *Ex parte Pickett*, 24 Ala. 91), that a member of the general assembly of 1853, which adjourned over on the 20th of December of that year to the 9th of January, 1854, who went home and returned during the recess, was entitled to mileage for this travelling from and to the capital.

And we find that, by an act of the legislature, approved February 21st, 1860 (Pamphlet Acts 22-3), this construction by the court of the provisions of the Code was almost expressly recognized. For—after prescribing the distances for which members from each of the several counties should be allowed mileage—by section 2 it is "*further enacted* that the provisions of the foregoing section shall not apply to mileage at the present session in coming to or returning from the same at the commencement and close thereof, but shall apply to mileage of members going to and returning from home at *any recess that may be taken during the session*."

Although this was a temporary provision, that related only

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to that session, it plainly shows that the legislature was aware of and acquiesced in the adjudication made in *Ex parte Pickett*. And when by the act approved February 19, 1869, the legislature prescribed the pay and mileage, which is now incorporated in section 49 of the Revised Code, in terms, so far as the point under consideration is involved, almost identical with those construed in the case referred to, we must hold that they were reenacted with the same meaning which the court attributed to them by its decision. *Duramus v. Harrison et al.* 26 Ala. 336; *Sartor v. Br. Bank*, 29 Ib. 353.

The question, however, remains whether the proviso to the resolution to adjourn from the 17th of December to the 13th of January has the effect to deprive the members, as it was intended to do, of the mileage to and from their homes, during the recess. It is insisted, on behalf of appellant, that it does not, because the resolution not having had three readings in each house, and not having been signed by, or presented to the governor for his approval, cannot have the effect of a law. While adversely it is contended that it has this effect, to the extent contemplated in it, by virtue of sections 16 and 17 of Art. IV. of the Constitution of the State.

The 16th section provides that "Every bill or resolution, *having the force of law*, to which the concurrence of both houses of the general assembly may be necessary, *except on a question of adjournment*, . . . shall be presented to the governor, and if he approve, he shall sign it," &c. And the 17th section provides that "Every order, resolution, or vote, to which the concurrence of both houses may be necessary, *except on questions of adjournment*, and for bringing on elections by the two houses, shall be presented to the governor," &c.

No section of the Constitution requires that a resolution proper, although it must pass both houses of the general assembly, shall have in each three several readings. Bills must pass through that process. And section 16 imports that a resolution which has passed both houses, without having been read three several times in each, may have "the force of law," if approved and signed by the governor, or without such approval and signature, if it relates to "a question of adjournment."

The resolution under consideration does relate to "a question of adjournment," and was passed by both houses. Is the proviso to it foreign to the "question of adjournment?" It is as follows: "Provided no member of the general assembly shall be entitled to receive any mileage in going to or returning from his home."

Is not this germane to the matter of the resolution? It relates directly to the expense attending the adjournment,

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which, we may suppose, was made for so long a time, for the accommodation of the members themselves. Wherefore, they, by the same joint resolution, provide that they shall not be entitled to mileage during a recess created for their own enjoyment.

Of course, laws which are to be permanent and universal, or general in their operation, must be enacted by bills. And "no money shall be drawn from the treasury but in pursuance of an appropriation made *by law*." Nor can the members of the general assembly receive any compensation but such "as may be prescribed *by law*." Resolutions, therefore, "having the force of law," have only a narrow field of operation. They are special in their nature, and generally transient in operation. They relate to particular matters or occasions upon, or concerning which, their function is accomplished.

Now, is not the resolution under consideration, with its proviso, of that nature? Is not the proviso germane to the special matter and occasion to which the part preceding it relates? The whole is one entire resolution by which, at the same time, the two houses take a recess of four weeks, doubtless for the accommodation of their members, and deny to those members the travelling expenses to and from their homes on that occasion, with which the State would otherwise be charged. To this extent, we think, that without being properly a law, the resolution may have, in the language of the Constitution, "the force of law," and as it relates to a question of adjournment, be valid without the signature of the governor.

The fact that in such a case a particular member voted against the resolution cannot have the effect of exempting him from its operation. It must be valid as to all, or not valid as to any of the members.

The subject is certainly not free from difficulty, and we have not found any authorities upon the point above discussed. But we think it is a case in which, using the language approved by this court in *Sadler v. Langham* (34 Ala. 322), "unless it be *clear* that the legislature has transcended its authority, the courts will not interfere."

The conclusion to which we have come is, that the motion in this court must be denied, and the judgment of the circuit court, denying the writ of *mandamus* and dismissing the application for it, be affirmed.

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[Pettus, Administrator, v. McClannahan.]

Pettus, Administrator, v. McClannahan, pro ami.*Order vacating and annulling Sale of Decedent's Land.*

1. *Judgment; what may be set aside at subsequent term.* — Void judgments may be set aside after the expiration of the term; but to authorize this, the invalidity of the judgment must appear on the face of the record, and not from matter *dehors* the record, except in cases of fraud, and where judgment was rendered after the death of a party.

2. *Sale of decedent's lands; when jurisdiction of probate court attaches.* — The jurisdiction of the probate court to order a sale of a decedent's lands for payment of debts is *in rem*, and attaches upon the filing of a petition containing the jurisdictional allegations.

3. *Presumption as to existence of jurisdictional fact.* — No presumption of the existence of the jurisdictional facts arises from the mere exercise of jurisdiction by a court of inferior or limited jurisdiction; yet when its record declares the ascertainment of such jurisdictional fact, its determination is conclusive until reversed on appeal.

4. *Same; as to sale of lands descended to minor.* — An order of sale of lands, descended to an infant or person of unsound mind, made without ascertaining the necessity, by proof of disinterested witnesses taken in deposition as in chancery cases, is void. But where the court has obtained jurisdiction by the filing of a proper petition, and its record recites that the court ascertained the necessity for a sale by proof of disinterested witnesses, taken by deposition as in chancery cases, errors in determining that the depositions were taken as in chancery cases, or that they proved the necessity for a sale, and the like, are mere errors and irregularities after jurisdiction attached, and cannot avoid the decree except on revision on appeal.

APPEAL from the Probate Court of Lauderdale.

On the hearing of the application of John D. McClannahan, a minor, by next friend, to vacate, annul, and set aside a sale of lands of the estate of James McClannahan, made under order of the probate court in the year 1860, the following facts were proved: —

1. On the 10th of December, 1860, W. W. Pettus, administrator of James McClannahan, filed in the probate court his sworn petition praying a sale of his intestate's lands, for the purpose of paying debts. The petition alleges the residence and death of the intestate in that county, his seisin of the lands situate in the county, which are particularly described, and the insufficiency of personalty to pay the debts. It also states that Elizabeth, the widow, who was entitled to dower, and James, an infant six years old, residing with his mother in said county, are the only heirs-at-law, or persons entitled to share in the estate. The widow consented in writing that all of the lands, except a certain portion reserved, should be sold freed from her claim of dower.

2. On the filing of the petition a day was properly set for the hearing, and a citation ordered to be served upon Elizabeth, the mother of James, ten days before the hearing. On the 27th of December the court made an order reciting that citation had been duly served upon said James, &c., appointing V.

52	55
95	479

52	55
99	470

52	55
101	340
101	541

52	55
105	470

52	55
107	354

52	55
113	161

52	55
119	652
117	462
117	466
117	467
117	536

52	55
123	418

52	55
128	651

52	55
137	625

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M. Benham a suitable and fit person *guardian ad litem* for the minor, &c.

3. On the day set for the hearing, the court granted an order of sale of the lands. The decree, after reciting the filing of the petition for a sale for payment of debts, the setting of a day for the hearing, the due service of citation upon said James, the appointment of Benham as guardian *ad litem*, and his appearing and consenting to act, and filing a written answer denying the allegations of the petition, proceeds as follows: And it having been proved to the satisfaction of the court by the oaths of who are disinterested witnesses, and whose testimony has been taken by deposition as in chancery cases, and which testimony has been filed or heard in this proceeding, that the personal property is insufficient to pay the debts of said estate, and that it is necessary and will be to the interest of said estate that said lands [here follows description of lands described in petition] should be sold for the purpose of paying debts according to the prayer of the petition. It is therefore ordered, &c. [here follows decree of sale]; and it is further ordered that said application and all the papers connected with this proceeding be recorded."

The administrator made the sales, now sought to be set aside, in accordance with the terms of the order, and they were duly reported to and confirmed by the court.

The bill of exceptions recites that "there is a paper in the file relating to said estate, containing interrogatories to Thomas N. Williams and J. W. Briggs, in regard to a necessity for the sale, and answers written to and under each of the interrogatories except the last one, and the paper is signed Thos. N. Williams, J. W. Briggs, W. W. Pettus, administrator; and that paper forms part of the final record of the case, and the paper and the final record of it constitute the only attempt at proof of necessity for such sale. It does not appear that the interrogatories were filed and notice thereof given to the guardian *ad litem*, nor does it appear that he waived notice, or that he crossed the interrogatories, or consented to the examination of the witnesses. It does not appear that any commission issued to take the deposition of the witnesses upon the interrogatories, nor does it appear that any such deposition was taken, nor that the witnesses were sworn, there being neither oath nor certificate of commissioner attached to or otherwise connected with said interrogatories and answers."

The administrator and others, purchasers at the sales, and claiming, as the petition states, to be owners of portions of the land, were made defendants to the petition, which alleges that the sales "were void for nonconformity to the act of February 7th, 1854, in this: that the petitioner then, and still, a minor,

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was interested in the lands, and proof was not taken as in chancery cases to show the necessity for the sale." This petition was filed some time in the year 1873, and the 8d day of October, 1873, set for the hearing.

The defendants demurred to the petition, and also moved to dismiss, and pleaded the order of sale of December, 1860, in bar of the relief sought. The court overruled the demurrer and motion to dismiss, holding that the order of sale did not conform to the statute, and accordingly made a decree vacating and annulling the order of sale and sale under it. The various rulings of the court and the decree vacating the order of sale, and sales under it, are now assigned as error.

O'NEAL & O'NEAL for appellant. — The petition, reciting all that the statutes require, called the jurisdiction of the probate court into existence, and the jurisdiction thus arising, the same presumption that it was rightly exercised prevails as in reference to courts of superior and general authority. *Comstock v. Crawford*, 3 Wallace, 396; *Florentine v. Boston*, 2 Wallace, 215. The "necessity for sale" was the jurisdictional fact, and it was for the probate court to decide the existence of that fact, and the exercise of this jurisdiction warrants the presumption that the necessity was proved. *Grignon's Lessees v. Astor*, 2 Howard, 319, and authorities *supra*; 44 Ala. 312; 29 Ala. 510. Mere errors and irregularities, after the court has obtained jurisdiction, do not render the sale void. 47 Ala. 361, and cases cited. This being the case, the order of sale cannot be collaterally assailed.

KEYES & JONES, *contra*. — The record fails to show that proof was taken by deposition as in chancery cases. The decree shows only that on the "oaths" of disinterested witnesses a necessity for sale was shown, &c. It does not name the witnesses. The paper found in the final record shows that no deposition was taken, no commission issued, no cross-interrogatories filed, no witnesses sworn, and the like. The whole proceeding was in plain violation of the 5th section of the act of February 7th, 1854, and is void, and being void the court could set it aside at any time.

BRICKELL, C. J. — If a judgment or decree is not void for want of jurisdiction, the court rendering it, whether it is a court of superior or inferior, of general or limited jurisdiction, has not power, at a term subsequent to its rendition, to vacate or alter it. The correction of clerical misprisions is the extent of the power the court can subsequently exercise. *Johnson v. Glascock*, 2 Ala. 522; 2 Brick. Dig. 141, § 150. The rule

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rests upon the clear and intelligible principle, that the interests of society demand there should be a termination to each controversy ; or, as it is expressed in the familiar maxim, "*Interest reipublicæ ut sit finis litium.*" There would be but little value attached to judicial proceedings ; but little quiet to titles ; but little repose in society, if a court had power, after deliberating upon causes, ascertaining and declaring the rights of parties, after its adjudications had passed out of the "breasts of the judges," to reopen and redetermine the controversy. As is said by a recent writer : "If a vacillating, irresolute judge were allowed to thus keep causes ever within his power, to determine and redetermine them, term after term, to bandy his judgments about from one party to the other, and to change his conclusions as freely and as capriciously as a chameleon may change its hues, then litigation might become more intolerable than the wrongs it is intended to redress." Freeman on Judgments, 596. The judgment or decree may be erroneous ; it may abound with irregularities ; the power to revise and correct does not lie within the jurisdiction of the court rendering it. The jurisdiction of that court was exhausted when the judgment or decree was rendered. As an incident to that jurisdiction, if mere clerical misprisions have intervened, and the record affords the means of correction, it is the duty of the court, whenever required by a party in interest, to make the correction.

When, however, a court has rendered a judgment or decree void on its face, a due regard to its own dignity, the protection of its own officers, and the preservation of the judgments it may rightfully render, demands that it should on a proper application vacate such judgment or decree at any time subsequent to its rendition. If fraud is not imputed, the invalidity of the judgment must be apparent on the face of the record, and must not depend on matter extrinsic to, or *dehors* the record, except in the event of the death of either party, on whom the judgment or decree is to operate, when it was rendered. 2 Brick. Dig. 140, §§ 137, 140.

The inquiry propounded by the application of the appellee is, had the court of probate jurisdiction to render the decree for the sale of the lands of his ancestor ? As is said by Chief Justice WALKER, in *Satcher v. Satcher* (41 Ala. 39), it is beyond the pale of controversy in this court that the proceeding before the probate court, for the sale of the lands of the decedent, is *in rem* ; that the jurisdiction of the court attaches, upon a petition setting forth a statutory ground of sale ; and that the order of sale is not void, although the proceedings may abound in errors, if the petition contains the jurisdictional allegation. We do not understand the appellee as controverting this principle,

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or as assailing the petition for sale, as insufficient to call into exercise the jurisdiction of the court. The specific ground on which a vacation of the order of sale is prayed is, that proof of the allegation of the necessity of sale — the jurisdictional allegation — was not taken by deposition as in chancery cases. Prior to the statute of February 7, 1854, which now forms §§ 2224-5 of the Code, the absence of such proof, though expressly required, was an irregularity not affecting the validity of the decree of sale when collaterally assailed. The jurisdiction having attached on the filing of the petition, the omission to take the proof of the fact by deposition as in chancery proceedings was an error, an irregularity occurring in the exercise of the jurisdiction. *Field v. Goldsby*, 28 Ala. 218; *Satcher v. Satcher*, *supra*. The effect of the statute of 1854 is, when the proceeding is for the sale of lands descended to an infant, or person of unsound mind, to convert this error or irregularity into a defect which vitiates the decree of sale, as absolutely as an excess or usurpation of jurisdiction.

The record of the order of sale, granted by the court of probate, affirms that the jurisdictional allegation, the insufficiency of the personal assets for the payment of debts, and the necessity to sell the lands for the payment thereof, were shown to the satisfaction of the court, by deposition taken as in chancery cases. True, the record does not disclose the names of the witnesses whose depositions were taken, and a blank space is left, probably for the subsequent insertion of the names; yet, there is the distinct affirmation that the depositions of disinterested witnesses were taken as in chancery cases, and proved the jurisdictional fact to the satisfaction of the court.

It is a recognized principle, which this court has frequently been required to announce and to apply, that if a court of limited jurisdiction — and the court of probate, in the exercise of its statutory authority to sell the lands of a decedent, is a court of limited jurisdiction — is charged with the ascertainment of a jurisdictional fact, and its proceedings show the fact was ascertained, they cannot be collaterally impeached. *Wyatt v. Rambo*, 29 Ala. 510; *Hamner v. Mason*, 24 Ala. 480; *Reynolds v. Kirkland*, 44 Ala. 312. Herein lies a distinction between courts of general and courts of limited jurisdiction. "Nothing is intended to be without the jurisdiction of a supreme court (or a court of general jurisdiction), but that which specially appears to be so; and on the contrary, nothing is intended to be within the jurisdiction of an inferior (or court of limited jurisdiction), but that which is so expressly alleged." *Commissioners of Talladega v. Thompson*, 18 Ala. 694. From the mere exercise of jurisdiction, by a court of general or superior jurisdiction, the existence of the jurisdictional facts is in-

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ferred, unless the record discloses the contrary. From the exercise of jurisdiction, by a court of inferior or limited jurisdiction, the existence of jurisdictional facts is not inferred; they must affirmatively appear on the record. When the record of such a court discloses that the fact on which the jurisdiction depends has been ascertained by the court, the determination is *res adjudicata*, and cannot be questioned. The record imports, then, absolute, uncontrollable verity, and possesses undoubted validity and efficacy. The case of *Hamner v. Mason, supra*, is a striking illustration of this principle. The former orphans' court had jurisdiction to discharge the sureties of a guardian, on their application, and on the taking of a new bond with sureties. The taking of a new bond was the fact on which the jurisdiction to discharge the sureties depended. This fact must have appeared of record, to give validity to the discharge. The sureties of a guardian of several infants, who had given a single and joint bond, applied for an order requiring the guardian to give a new bond and new sureties, and for their discharge from further liability. A decree was subsequently rendered by the court, reciting the fact that the new bond was given with sureties approved by the court, and discharging the former sureties from further liability. From the new bond the name of one of the infants was entirely omitted, so that in point of fact it was not a security to him, and not a protection to his estate; yet this court declared the recital in the decree, that a new bond had been taken, was conclusive, incapable of impeachment or contradiction. The court say: "Where the fact upon which the power to act depends is referred by the law-maker to be determined by the court or officer, the determination of the fact by such court or officer is *res adjudicata*, and cannot be questioned. The question whether a new bond had been given was referred to the court, and was determined by it. This fact appears affirmatively from the record, and the recital is not traversable." When lands have descended to an infant or person of unsound mind, the statute of 1854 requires, if the court of probate orders such lands to be sold, on the application of the personal representative of the ancestor, that proof of the necessity of sale must be made by deposition taken as in chancery proceedings. On the court is devolved the duty of determining whether the proof is thus made. The court alone examines the mode in which the proof is taken. Its determination of necessity is *res adjudicata*. If it errs in its judgment, it is, like any other error into which the court may fall, the subject of revision and correction by an appellate tribunal. Until reversed, the judgment is conclusive, the law attaches to it undisputed and undisputable faith and credit. If this be not so, then at once the inquiry arises, What

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character or degree of error will vitiate the decree? Will the mere failure to nominate the commissioner, specifying his place of residence, as is requisite in the taking of depositions in chancery, vitiate the decree? Will the mere failure to state the residence of the witnesses work the destruction of a judicial proceeding which has become the foundation of titles to property? Will a mere departure from the essentials of the commissioner's certificate, which is cured if not made the subject of a specific objection before entering on the hearing in chancery, render the decree void? Is it not apparent that when the court declares the depositions have been taken as in chancery proceedings, the fact is conclusively ascertained, and judicially determined, not the subject of any other evidence, when the decree is collaterally assailed? Every defect the probate court, in its judgment vacating the order of sale, imputes to the depositions taken, may or may not exist. If they exist, they were the subject of objection and of determination when the order of sale was made. The court then determined the depositions were taken as in chancery proceedings. At no subsequent term could the court revise and reverse that determination. That lay within the jurisdiction of this court, and the lapse of time would have precluded this court from exercising the jurisdiction, when this application to vacate the sale was made and determined. In *Carter v. Waugh* (42 Ala. 452), which was an application of the character we are considering, the vacation of the decree of sale was sought on this among other grounds: "that the proof by deposition was not regularly or validly taken and returned." The record did not disclose, except by implication, and not by positive affirmation as in this case, that the proof of the necessity of sale had been taken by deposition as in chancery cases. The depositions found in the record were certainly irregularly taken, and did not appear to have been taken and certified by the commissioner. The court say: "It is true that the depositions appear upon their face to have been irregularly and imperfectly taken and returned to the court of probate, but this does not render the order of sale void. Besides, the order of sale judicially ascertains every matter necessary to show their regularity as against an attack of the kind made in this case." And so the record in this case judicially ascertains that every fact on which the jurisdiction of the court depended existed, and so declaring, the facts are not now open to further controversy.

The decree of the court of probate is reversed, and a decree here rendered dismissing the application of the appellee, at the costs of his next friend, in this court, and the court of probate.

[Broughton v. Atchison.]

Broughton v. Atchison.

Trover for Conversion of Cotton.

1. *Trover; construction of bill of exceptions.* — Where it may as well be inferred from the testimony that persons were joint contractors in a farming adventure as that they were partners *inter sese*, it will not be presumed that a crop of cotton, an undivided half interest in which was mortgaged by one of them, was partnership property, so as to defeat trover by the mortgagee against a stranger for a conversion.

2. *Trespasser; what questions cannot raise.* — A mere naked trespasser sued by the mortgagee in trover for the conversion of mortgaged property, cannot question the validity of sale by plaintiff of a portion of the mortgaged property, nor complain of the application of the proceeds as between different debts of the mortgagor, nor ask an allowance or deduction of profits on resale of property purchased by mortgagee at his own sale.

APPEAL from Circuit Court of Lowndes.

Tried before Hon. JAMES Q. SMITH.

Jane Atchison, appellee, brought suit and recovered judgment against Broughton, the appellant, in an action of trover, for the conversion of two and a half bales of cotton.

In January, 1871, one J. M. McDonald rented land from plaintiff for a year, for which he agreed to pay three and a half bales of cotton as rent. He told her, at the time, that he and one M. F. Bonham "intended to cultivate the land in partnership." McDonald went into possession and cultivated the land with his own and Bonham's mules, and plaintiff sold some corn to Bonham to feed the mules. In February, 1871, McDonald purchased a horse of plaintiff for the sum of \$175, for which he executed his note, and gave a mortgage, to secure it, on the horse and his "undivided half interest in a crop being grown by me on the plantation of said Atchison." The mortgage contained a power of sale after public outcry at Hayneville, upon "giving thirty days' notice by advertisement in the county." About six bales of cotton were raised on the rented land that year, all of which McDonald hauled off at the close of the year, except about four hundred and sixty pounds of lint cotton which plaintiff got on taking possession shortly afterwards, upon McDonald's moving off. Plaintiff got \$92 for the lint cotton. She sold the horse at public outcry at Hayneville, after giving thirty days' notice by posting, bidding him in for \$66 and afterwards sold him for \$100 in 1873. She had expended \$80 in caring for the horse, and had received \$25 hire for him. Plaintiff testified that she made no appropriation of the proceeds of the lint cotton, either to rent due or to the mortgage debt. Two bales of cotton grown on the rented land were hauled off to the defendant's gin-house and he had them deposited in the railroad warehouse, taking the receipts therefor in his own name, and

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on demand refused to deliver up the cotton. How Broughton got the cotton, or what claim he had to it, or what he did with it afterwards is not shown. McDonald was dead at the time of the trial. This was all the evidence.

The court charged the jury as follows: —

1st. "That the lien of the plaintiff entitles her to maintain this action, if the evidence shows that the defendant, without authority from the plaintiff, took the cotton in evidence and converted it to his own use."

2d. "That the sale by plaintiff of the four hundred and sixty pounds of cotton does not authorize the jury to allow the proceeds thereof as a payment on the mortgage debt, but the law will apply the same to the payment of the rent."

3d. "The defendant is only entitled to a credit for the amount of the sale at public auction, less the expenses of the sale."

To the giving of each of these charges the defendant duly excepted; and requested the court to give three written charges which were refused and defendant again excepted. The charges refused asserted: 1st, that the McDonald mortgage did not convey any interest in the cotton which could be enforced in this suit; 2d, that under the mortgage plaintiff was bound to apply the proceeds of the lint cotton to the payment of the mortgage debt, and could not apply it to any other debt without the consent of the mortgagor; 3d, that a sale under the mortgage, notice of which was given by posting only, was invalid.

R. M. WILLIAMSON, for appellant. — 1. The evidence shows that there was a partnership between Bonham and McDonald. The first charge took that question from the jury. If they found the existence of a partnership, their verdict could not have been as directed by the court. Plaintiff, by her mortgage, obtained title to no specific portion of the cotton; it only gave her an equitable interest after payment of debts of the partnership.

2. The second charge given was erroneous, and the same may be said of the refusal to give the second charge requested. Plaintiff, as landlord, had no right to take possession of the lint cotton to enforce her lien. She did have such right under the mortgage, and by that instrument the parties appropriated the mortgaged property to the payment of the mortgage debt. Neither party alone could direct any other appropriation. *Dulany v. Dickinson*, 12 Ala.; 27 Ala. 445; *Hilliard on Mortgages*, 469.

3. Buying at her own sale, and then reselling at a profit, plaintiff became accountable for the profits realized. 14 Ala. 147. The sale was void; notice by *publication* was required; it was given by posting.

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WATTS & TROY, *contra*. — 1. The mortgage to an undivided half of the crop gave plaintiff a right to maintain *trover* against every mere trespasser who, like Broughton, converted the mortgaged property. 20 Ala. 212; *Brown v. Beason*, 24 Ala. 466; *Parminter v. Kelly*, 18 Ala. 466; 27 Ala. 404.

2. The evidence does not necessarily show a partnership: it leaves it doubtful, to say the least of it. The mortgage was made after the renting, and was therefore made subject to the landlord's lien for rent. Plaintiff not having applied the proceeds of the lint cotton to either debt, the law would apply it to the rent. 5 Monroe, 253; *Hamner v. Richester*, 2 J. J. Marshall, 146; 2 Rich. (Equity) 63; 27 Ala. 445.

3. No one but the mortgagor can complain of plaintiff's purchasing at her own sale. That sale was valid. *Robinson v. Cullum*, 41 Ala. 93. There was no proof that any newspaper was published in the county; the mortgage only required publication; posting was, therefore, sufficient. Broughton is a naked trespasser, and has no concern with the questions attempted to be raised by the charges requested; it was right therefore to refuse them whether they contained correct exposition of the law or not. The charges given, if erroneous in any particular, were too favorable to appellant.

JUDGE, J. — It is contended by the appellant, in effect, that the evidence, as disclosed by the record, shows that there was a partnership between McDonald and Bonham in the cultivation of the land rented by McDonald to the appellee, and that the cotton for the conversion of which this suit was brought, having been grown on the rented premises, was partnership property, and that therefore the action of *trover* cannot be maintained by the plaintiff.

It was shown by the evidence that McDonald alone made the rent contract with the plaintiff below, and promised to pay the rent, which was to be three and one half bales of lint cotton; but he stated at the time that the land was rented in behalf of himself and Bonham, and that they *intended* to cultivate it in partnership. The evidence showed further, that McDonald and Bonham had worked the land together during the year 1871, the period for which the land had been rented. But there was an entire absence of evidence to prove the terms and conditions of the agreement between them, under which they cultivated the land, and by which it might be seen whether or not a partnership had been formed. We do not think it a legitimate inference, from the evidence, that a strict partnership had been formed between the parties. The evidence may as well authorize the conclusion that they were only contractors in a joint farming adventure; and this con-

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struction harmonizes with the rule that the bill of exceptions is to be construed most strongly against the party excepting.

When the law-day of the mortgage had passed, the plaintiff became invested with the legal title to that portion of the crop covered by the mortgage, and could maintain trover against the defendant if he had been guilty of an illegal conversion of any part of it.

But how did the defendant stand? No evidence was offered by him to show how he acquired the possession of the cotton, nor did he make any attempt to connect his possession with an outstanding title in another. From aught that appears in the record, he stood before the court in the attitude of a naked trespasser. Thus standing, he had no right to make any question in the court below as to the proper application of the money derived from the sale of any of the mortgaged property, nor to contend for an allowance to him of any profit resulting from the sale of the horse by the plaintiff after she had purchased him at the mortgage sale, nor to make objection to the mode in which the horse had been advertised for sale under the mortgage. If these questions, or any of them, could be made at all, they could only be made by McDonald, or those standing in his stead or holding under him.

It results that there is no error in the record of which the appellant can complain, and that the judgment of the circuit court must be affirmed.

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Action on Bill of Exchange.

Error; what not ground of.—It cannot be assigned for error that a judgment rendered on, and corresponding with, the verdict, is for a greater amount than claimed in the complaint. The remedy in such a case is by motion for new trial in the court below.

APPEAL from City Court of Montgomery.

Tried before Hon. JOHN D. CUNNINGHAM.

The point decided appears sufficiently from the opinion.

BAGG & THORINGTON, for appellant.

STONE & CLOPTON, *contra*.

BRICKELL, C. J. — The assignments of error in this cause cannot be sustained. Judgment was rendered on verdict, and corresponds with it. It has long been settled that when a
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judgment is rendered on, and corresponds with, a verdict, it cannot be assigned as error that the judgment exceeds the amount claimed in the complaint or declaration. The remedy is by a motion in the court below for a new trial. 1 Brick. Dig. 776, § 39; *Drake v. Johnston & Seats*, January term, 1873. The judgment is affirmed.

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Appeal from Order refusing to dissolve Injunction.

1. *Office; not property.* — In this State offices are not property in any strict legal sense.

2. *Address of grand jury; what sufficient to authorize requisition of additional bond.* — A report by the grand jury of the city court of Montgomery, made in term time, and addressed to the presiding judge of that court, as follows: "*We find the bonds of the county officers good, except that of the tax-collector. We recommend that he be required to give additional security.*" properly certified to the probate judge of that county, authorizes him to require an additional bond of the tax-collector.

3. *Vacancy in office; what creates.* — The failure of a public officer to give an additional bond, legally required of him, occasions a vacancy in the office, which, being duly certified, authorizes the appointment of another to fill it or the institution of judicial proceedings to divest the right of the former incumbent.

4. *Same; when former officer, after vacancy occurring, may be treated as officer de facto.* — The official acts of a tax-collector, who, failing to give an additional bond, obtained an injunction restraining the governor's appointee from claiming the office or exercising any of the duties thereof, and thereafter continued to discharge the duties of the office, will, so far as necessary for the protection of third persons and the public, be treated as the acts of an officer *de facto*.

5. *Same; former incumbent and not appointee must resort to action to determine right to office.* — One duly appointed, commissioned, and qualified to fill a vacancy in office duly certified to the appointing power, becomes the legal incumbent, and entitled to discharge the duties of the office. The former incumbent and not the appointee must resort to action at law to determine the right to the office.

6. *Same.* — An appointee duly commissioned and qualified to fill a vacancy in an office, duly certified to the appointing power, cannot be restrained or interfered with by injunction at the instance of another claimant, from entering upon the discharge of the duties of the office; nor can his right to the office be determined in any way by the chancery court.

7. *Overruled case.* — The case of *Bryan v. Bruner* (in MSS.) overruled.

8. *Mandamus; when will not lie.* — *Mandamus* will not lie to compel the probate judge to approve an official bond, which he, acting in good faith, was of opinion was insufficient, and for that reason declined to approve.

APPEAL from Chancery Court of Montgomery.

Heard before Hon. ADAM C. FELDER.

This was an appeal from an order refusing to dissolve an injunction.

The case as made by the bill and the answer, so far as it is material, may be thus stated: —

At the general election in November, 1871, appellee Robinson was duly elected tax-collector of Montgomery county, and after having been commissioned and duly qualified, entered

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upon the discharge of the duties of the office, and so continued up to the filing of the bill. At the July term, 1874, of the city court of Montgomery, the grand jury made a report or address, in term time, addressed to the presiding judge of that court, in which was made the following statement: "*We find the bonds of the county officers good, except that of the tax-collector. We recommend that he be required to give additional security.*" This report was duly certified by the clerk, under the seal of the city court, to GEORGE ELY, probate judge, who thereupon issued and served upon the appellee a requisition to give an additional bond, as required by the statute.

Robinson, denying the authority of the probate judge to make the requisition, tendered a bond, within the time prescribed, which the probate judge declined to approve, on the ground that the sureties were insufficient. Thereupon, on the day before the expiration of the time by which the probate judge was authorized to certify to the governor a vacancy in the office by reason of Robinson's failure to file an approved bond, he applied to and obtained from the judge of the second judicial circuit a rule *nisi* against the probate judge, returnable to the next term of the circuit court, to show cause why he should not be compelled to approve the bond tendered. In this petition, as well as in the bill filed in this cause, it is alleged that the refusal of the probate judge to approve the bond was dictated by personal malice and enmity toward appellee, and that the bond tendered was in all respects legal and sufficient, as the probate judge well knew. It is further alleged that the probate judge, in order to avoid service of the rule *nisi*, secreted himself in the outskirts of the city until the time should elapse when he would be authorized to certify a vacancy, and one hour before the rule *nisi* was served upon him, made and delivered to the governor a certificate of vacancy in the office, by reason of the failure of Robinson to file an approved additional bond, as required by the requisition. It is unnecessary, in the view which the court took of the case, to refer more in detail to the allegations of the bill on this point.

On the 27th day of August, 1874, the governor appointed Eugene Beebe tax-collector for Montgomery county, and caused a commission to issue to him, as such, under the great seal of state. This commission was in the usual form, and stated nothing as to the appointment being made to fill a vacancy. On the same day Beebe duly qualified by giving an approved bond and taking the oaths required by law, and since that time held himself out to be tax-collector, acted as such whenever he could, and sought to induce tax-payers to pay taxes to him.

The bill alleges that the proceedings of the grand jury and the subsequent action of the probate judge and the commission-

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ing of Beebe are not "due process of law," and cannot operate to deprive Robinson of the right to or possession of the office that being in office under election, and actively discharging the duties thereof, under a *bona fide* claim thereto, and in good faith having applied for a *mandamus* to compel the approval of his bond, which application is still pending, complainant Robinson is entitled to the possession of the office until the dispute to the title can be legally adjudicated; that being in office he cannot file a *quo warranto* or otherwise test Beebe's rights at law, and Beebe has not as yet brought any action at law against complainant; that by reason of Beebe's holding himself out as tax-collector, and by his endeavors to collect taxes and prevent their payment to complainant, complainant has been greatly impeded in the discharge of the duties of the office; that unless Beebe is restrained by injunction, the "tax-payers will be greatly harassed, taxes prevented from being collected, and the interests of the county of Montgomery and of the State of Alabama greatly prejudiced and injured."

Beebe is made defendant to the bill, and its prayer is that he be enjoined from claiming the office, or any of the rights, emoluments, papers, or property appertaining to it, and restrained from any interference whatever with complainant as tax-collector, until the further order of the court; that Beebe be compelled to deliver up whatever written evidence he may have of his appointment as tax-collector, and that on the final hearing the commission be cancelled and the injunction made perpetual, and for general relief. Upon complainant's entering into bond in the sum of a thousand dollars, the register, in accordance with the *fiat* of the judge of the second judicial circuit, issued an injunction as prayed for.

The answer of the respondent Beebe did not controvert the main allegations of the bill, except as to the sufficiency of the bond tendered, alleging that the probate judge, in refusing to approve it, had been actuated purely by a sense of duty, and affirmed the regularity and validity of the action of the grand jury and the subsequent proceedings resulting in the certificate of vacancy being made to the governor, and respondent's appointment by him as tax-collector. In the answer was incorporated a demurrer, the grounds of which were that the bill was without equity.

Afterwards respondent moved in vacation for a dissolution of the injunction, upon the denials in the answer, and for want of equity in the bill. The chancellor overruled the motion and hence this appeal.

ELMORE & GUNTER, for appellant.

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RICE, JONES & WILEY and D. S. TROY, *contra*.

MANNING, J. — Several causes, more or less like the present, have been before us during this term. In the argument of them, the idea has been kept prominent that public offices are the property of the incumbents. Much stress has been laid on the rights of persons in them as such. And sometimes it seemed to be supposed that the putting of one person into an office to which another had been elected, who has failed to do some act required to enable him to hold it, differs little, if at all, from the ejection of a citizen from his patrimonial estate, without due process of law.

Expressions imputing this character to public offices may be sometimes proper enough when used in illustration of an argument. It should not be forgotten, though, that such offices were not created for the benefit of individuals. The emoluments pertaining to them give them value, it is true, and make them much sought after for the income they afford. But these emoluments are merely incidental, — the salaries or pay for duties to be performed in the service of the public.

The offices themselves, if property at all, are the property of the people of the State. They are merely occupied by persons who are in the employment of the State as its officials. They may, not improperly, be considered as organs of the body politic, to which belong important functions in the political system; without the regular and proper performance of which functions there cannot be in the body politic — the State — that vigorous life and health which are necessary to constitute a prosperous and honored commonwealth. We have, therefore, more than once during this term, repelled the idea that the offices of the State are property in the sense in which it has become common so to regard them. *Ex parte Lambert*, p. 79; *Ex parte Harris*, in MS..

No doubt a citizen who has been elected according to law to an office has an interest in and a right to it, on complying with the conditions prescribed by law, upon which he is authorized to take and hold it. But being an agent therein, or servant of the public, he is subject, like other employees, to the rules and regulations ordained by those who created the agency, and for whose benefit it exists. The fact that he has been elected to it by a popular vote does not exempt him from the obligation to conform to such regulations, or, on failure to do so, from being dismissed in the methods and by the officials appointed by legislative or constitutional enactments, for the protection of the public interests.

Among public agents, tax-collectors are among the most indispensable. They gather from the people the revenue intended

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for both state and county treasuries ; without which revenues the administration of the government, and peace and good order in the community, could not be maintained. The law would consequently be very defective, if it did not provide that tax-collectors should furnish undoubted security for fidelity in the collection, safe keeping, and payment of the public dues. Statutes are enacted to effect these objects, which require them, before entering upon the discharge of their duties, to execute bonds with good and sufficient sureties, intended to be adequate to secure the public against speculation and delinquency. If it be afterwards ascertained that these bonds are not adequate security, others are required to be executed, approved, and filed. And if this be not done within a prescribed time, on certificate thereof to the governor, it is made his duty to appoint other persons to take the places of those so in default.

Some such arrangements are indispensably necessary to prevent general disorder in the administration of public affairs. Is there any reason for presuming that the duties created by these arrangements will not be conscientiously performed by the authorities on whom they are devolved? Let us see who these authorities are.

The bond of a tax-collector must be approved by the judge of probate of his county. The latter is himself elected by the people of the same county to a judicial position of so much concern to every citizen, that an election to it implies, on his part, intelligence, integrity, and an acquaintance with and fidelity to his constituents ; while at the same time a natural deference to the will of those constituents would incline him rather to favor than to be too exacting towards a tax-collector of their choice.

The question whether the bond is afterwards an adequate security, is to be determined from time to time by the grand juries or court of county commissioners of the county ; both of which bodies must be presumed to be, as the law intends they shall be, composed of substantial, respectable, law-abiding, and disinterested citizens, solicitous for the welfare of the community, and representing every portion of it. Under our system of government, where, better than in these bodies, could the people, through the legislature, have lodged this power of supervision on their behalf, over the security against misconduct, which is required of the receivers of the people's money ? In an inquiry of this sort, the people themselves could not collectively engage. Public interest demands prompt and faithful action in the matter ; and the agencies employed seem well adapted to secure impartial justice to the individual.

If, in the exercise of the authority thus conferred, a grand jury or the court of county commissioners represents that the

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bond of the officer is an inadequate security, the judge of probate is commanded to notify him thereof in writing, and require a new bond to be executed, and if it be not furnished within the ten days prescribed by the statute, the law declares the office to be vacated, and requires the judge of probate to make a certificate thereof to the governor, who must appoint some other person to the place. The vacancy thus declared is a true vacancy, without anything more being done, and may be at once filled by the governor. And his appointee, on giving bond and being qualified and commissioned according to law, becomes the true incumbent of the office, and entitled to demand and have all the books, papers, and other things belonging thereto.

Whether the vacancy mentioned, although a true vacancy, is so absolute as, without more, to strip the citizen who was elected by a popular vote of his right, by virtue thereof, to the office, in case he should afterwards file a good and sufficient bond approved according to law, before the appointment of his successor, we need not now determine. It seems to be intimated that it is not, in *Sprwls v. Lawrence*, 33 Ala. 674. The vacancy is declared for reasons of state, which require that offices shall be occupied. And it is certain that without so first complying with the provisions of the law in this respect, he is so entirely out of office that if he should then collect taxes from persons liable to pay them, they could be recovered back by an action against him. *Peck v. Holcombe*, 3 Port. 320.

This would be the situation, unless a court should interpose in his favor, as in this case was done by injunction, which would, with the commission he had previously received, give him such a color of title to the office as that his acts therein should be regarded, in the interest of the public, though not for his own benefit, as those of an officer *de facto*, and be a protection to those who should deal with him as such.

Robinson, the appellee in this cause, was elected in November, 1871, tax-collector of Montgomery county, and entered upon the discharge of his duty as such. In 1874 a grand jury of the county, constituted by the city court then in session, reported to it as follows: "We find the bonds of the county officers good, except that of the tax-collector. We recommend that he be required to give additional security."

This was certified to the judge of probate, who notified Robinson thereof, and in writing required of him additional security accordingly. On the last day allowed by law for the furnishing of this security, Robinson, at two o'clock in the afternoon, as he says, went to the judge's office in the courthouse to present to him a new bond, with sureties alleged to be good and sufficient, but did not find him there. An hour or

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two afterwards he met the judge of probate elsewhere in the city of Montgomery, and then delivered the bond to him to be approved and filed; and two or three hours later, about six o'clock in the evening, the judge returned the bond to Robinson, informing him that he refused to approve it, and with an indorsement on it, signed by the judge, to that effect. This occurred in August last.

On the next day the judge of probate, in due form, certified that the office of tax-collector of the county was vacant, to the late governor, who some days afterwards appointed the appellant Beebe to it; and he having executed an official bond with sureties, which was approved and filed, and having qualified according to law and received his commission, entered upon the discharge of the duties of tax-collector, and gave notice thereof by advertisement to the public.

Thereupon Robinson filed the bill in this cause against Beebe, the appellant, alleging the premises, and that the judge of probate, in refusing to approve his bond, had acted from prejudice and corruptly, and had evaded the service upon him of an alternative writ of *mandamus*, issued by the judge of the circuit court, and that being in office, he, Robinson, could not bring his suit in the nature of a *quo warranto* against Beebe, and Beebe was not bound to bring a like suit against him; wherefore, he prayed a temporary injunction against Beebe to restrain him from exercising or claiming to exercise the office of tax-collector, and a perpetuation of the injunction at the hearing of the cause, and that Beebe be required to bring his commission into court to be cancelled.

Upon this bill, the judge of the second judicial circuit, which embraces Montgomery county, made his *fiat*, commanding the injunction to be issued upon Robinson's executing his bond with sureties in the sum of \$1,000 conditioned according to law, and a motion having been made in the chancery court in September last to dissolve this injunction for want of equity in the bill, and also upon the answer of Beebe, the late chancellor of the southern division overruled the motion and continued the injunction.

From this decree of the chancellor Beebe brings the cause into this court by appeal.

The counsel for appellee Robinson, disclaiming here any jurisdiction in this court to decide which of the parties is really entitled to the office in dispute, insists that this injunction should be retained until that question is determined in a court of law by a suit (it is intimated) yet to be brought, which Robinson, being in office, cannot bring, and Beebe may not choose to bring.

What then becomes of the interest of the State? The grand
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jury reported Robinson's bond not good ; and the truth of this report is not controverted in his bill. The additional bond he offered was pronounced insufficient by the judge of probate, and not being accepted or filed, is no security at all. And under the operation of the injunction, Robinson has been, for months, apparently kept in office as tax-collector of a county from which revenue exceeding \$100,000 is annually collected, upon an injunction bond for \$1,000, approved by a register in chancery, instead of an official bond of adequate amount, approved by the judge to whom that duty was by law intrusted.

It is suggested that this court may require a bond in a larger penalty ; and it is insisted that it ought to continue the injunction in favor of "an incumbent holding in good faith under a prior election or appointment and qualification" until the appointee of the governor shall oust him by *quo warranto*, or some other action at law, upon the verdict of a jury.

If this shall be the practice of courts of chancery, how is a delinquent tax-collector ever to be promptly replaced according to the provisions of the statute? Under title V., part I., of the Revised Code, relating to "offices and officers," are a number of sections that declare what shall constitute a vacating of office by the person in occupation of it. Section 177 (embracing tax-collectors) provides "such officer must give such additional bond ten days after the day specified in such requisition, and failing to do so, *he vacates his office*, and the officer making the requisition *must at once* certify the same to the appointing power, by whom the vacancy must be filled." And in the second *article* afterward, section 193 (154), it is enacted: "In all cases in which it is not otherwise expressly provided, when any office is vacated, except by the death of the incumbent, all books, papers, property, and money belonging or appertaining to such office, must, on demand, be delivered over to his qualified successor ; and every person violating this section is guilty of a misdemeanor, and on conviction thereof must be fined not less than two hundred dollars."

The succeeding sections provide for a prompt proceeding by *mandamus*, to compel the delivery of such books, &c., and for the imprisonment of the persons refusing to comply.

To grant or continue an injunction in such a case is to thwart the express design of the State, and obstruct its officials in the employment of the means prescribed by it to perpetuate its organization and carry on administration. We can hardly conceive a more improper use of the extraordinary writ of injunction.

The law, it will be observed, itself declares the office to be vacated by the incumbent on his failure to give another bond. And, as we have further seen by the case of *Peck v. Holcombe*

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(*supra*), during such vacancy, even if no other person were appointed until the required bond was given, Robinson would have no right to coerce the payment of a cent of tax from any citizen. The commission to Beebe, upon his having given bond and qualified, put him into the office as the incumbent, and put Robinson, and not Beebe, to an action at law to determine, as between them, which had the better right. . *Hill v. The State*, 1 Ala. 559; *People v. Draper*, 24 Barb. 265; *Tappan v. Gray*, 9 Paige, 509.

And the bill of complaint shows that he was proceeding to exercise the office of tax-collector. There was no other person who lawfully could do so, and the pretence of Robinson that he was the incumbent is contradicted by the facts disclosed by the bill itself. The effect, therefore, of the injunction which restrained Beebe from proceeding in the performance of the duties of the office, was really to prevent the functions of the office from being lawfully discharged at all. The injunction against Beebe could not legally confer authority on Robinson, and he was in continual violation of the law if, under cover of the injunction, he, as an officer *de facto*, proceeded to act as tax-collector.

A case similar to this arose under what was known as the Metropolitan Police Act of New York. It is reported in 24 Barb. 265, *The People ex rel. f.c. v. Draper et al.* It was argued on one side by Evarts, D. D. Field, Vanderpool, and others, and on the other side by O'Connor, Edmunds, and Sedgwick.

Wood, mayor of New York, caused suit to be brought by the attorney general in the name of the *People ex rel. Wood*, setting forth that Wood had been and was mayor of New York, and as such was made by several acts chief executive of the police department, and was acting as such; that the defendants by virtue of an act of the legislature, which was alleged to be unconstitutional and void, intruded themselves into and usurped the offices of police commissioners and heads of the police department, and praying that at the hearing defendants should be perpetually enjoined, and that in the mean time a temporary injunction issue, &c.

A temporary injunction having been allowed, a motion was made to dissolve it.

In stating the point, PEABODY, J., said: "Is the relief by injunction allowed in an action of *quo warranto* by our practice in any case? That there is no precedent for it in an action of this kind, is admitted on all hands," &c. After discussing the matter at some length, he came to the conclusion that the reason why such a power had never been exercised either in this country or England was, "that the public should not be

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deprived of the benefit of an office merely because it was uncertain whether the person, in and ready to perform the duties of it, were rightfully in, even while the title of the party assuming to act was in controversy. To restrain the action of the incumbent is to restrain all the functions of the office; for he being in, even if wrongfully, no one else can enter until he is removed, and he must act or no one can."

The same question came up before Chancellor WALWORTH, in *Tappan v. Gray*, 9 Paige, 509. While Tappan was legally in the office of flour inspector, discharging its duties, the governor, without the consent of the senate, illegally, as the chancellor thought, appointed Gray to the same office, who went on to discharge the duties and take the fees. The bill was filed by Tappan for an injunction until an action at law could decide the matter in dispute, and alleged that Gray was insolvent and unable to respond for the fees he might collect; wherefore he prayed for an injunction and a receiver of the fees.

The chancellor said: "This court certainly ought not to assume the jurisdiction to oust an officer in no way connected with the administration of justice here, and over whose appointment it has no control, from an office the duties of which he is discharging under color of an appointment from the executive of the State, until his right has been settled in the mode prescribed," &c.

A case like the present has heretofore been before this court (*Bruner v. Bryan*, in MS.) in which such an injunction was sustained. But being unable to adopt the views of the judge who vindicated the exercise of the power to enjoin the appointee of the governor, at the instance of his adversary, from qualifying and entering upon the office of sheriff, we feel compelled to overrule that case as an authority.

For the organization of the State by elections and appointments to office, constitutional and legislative arrangements have been made, and processes prescribed such as the people have considered best and most effectual for the prompt and efficient accomplishment of that essential operation. The persons or officials to whom they have intrusted the conduct, completion, and superintendence of these arrangements and processes, must be presumed to act conscientiously and faithfully, and the organization should not be obstructed by the interposition of courts, least of all by courts of chancery.

Pertinently here we may quote what was said by the chief justice of the supreme court of Pennsylvania, and concurred in by all the judges (among whom was Justice STRONG, now of the supreme court of the United States), in a case of contested election, in response to the objection of one of the parties, that he had been denied a trial by jury: "If this objection is well

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founded, then every step in the official organization of the State, or in the perpetuation of its organization, might stand in need of the sanction of a jury, and is potentially subject to the delays and expense of a jury trial, except in respect to the election of governor and members of the legislature, in relation to which the Constitution makes special provision. . . . This objection, therefore, has a fearful sweep, if it has any force; and we should stand appalled before it, if we should feel its force to be equal to its pretensions. But we do not feel it so. It is not in the act of organization of the State, nor in the perpetuation of its organization, but in the administration of rights under the organization, that the Constitution secures the right of trial by jury." *Ewing v. Filley et al.* 43 Penn. St. 384.

So we may say of the intervention of the courts without express authority of law, in a caselike the present, to prevent an appointee of the governor from taking office. If wrong be done or error committed, it is to be remedied or corrected by subsequent proceedings between adverse claimants in the courts, and not by interference to prevent the process of organization.

That complaints of fraud and misconduct against election officers and others will be made and believed during and after the periodical selection of officials in a popular government, is to be expected. But if upon charges of that sort the chancellors and judges of the State are to interfere, and take the determination of questions arising therein from those appointed by law to decide them, what is to hinder like charges from being made against them also? And how shall they be preserved any more than others, if not from the influence, at least from the imputation of the influence of partisan and sordid motives? *Quis custodiet ipsos custodes.* It concerns the highest interests of all citizens that the courts of the land shall not only be, but that the public shall also be satisfied that they are, free from the disturbing excitements of political contests, by being, as much as possible, kept from participation or control in the processes of state organization.

In the cause before us it was insisted that the report of the grand jury, from which we have quoted the portion in respect to the insufficiency of the appellee's bond, having been made to the judge of the city court, was for that reason ineffectual under section 195 (136) of the Revised Code. This section, it was argued, provided that the address mentioned should be made to the judge of probate. The city court has jurisdiction coextensive with the county of Montgomery, and is a court of both civil and criminal jurisdiction. A grand jury appertains to the court which constitutes it, and is under the charge of its officers. The probate court judge has no official connection with the grand jury, or it with him. Its members

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are not necessarily known as such by him. The evidence of its acts are preserved only among the papers and upon the records of the court from which it derives its origin, and in which the names of its foreman and his associates are recorded. Official regularity, therefore, as well as uniform practice, sanction the custom of making its report to the court to which it appertains.

And we think that no one would be disposed to hold a judge of probate excusable in not acting upon such a report as the one shown in the bill in this cause, for the reason that it was not formally addressed to him. In this case a copy of it was certified to him from the city court.

The charge of a corrupt purpose to injure appellee, made against the judge of probate, is one we cannot notice to sustain. He is not a party to this suit; and we are not at liberty to act upon the idea that in the performance of an official duty, devolved upon him in respect to complainant's bond, he did not act conscientiously and properly. It does not appear that he absented himself during any of the fourteen days, after his requisition was served upon Robinson, that intervened before the bond was presented to be approved. Nor is it alleged that he was informed that another bond, or other sureties upon the bond which he refused to approve, would be tendered to him during that day. Indeed, it is not pretended that there was any intention to make any additional bond, or get any other sureties. Appellee says, on the contrary, that he immediately made application to the Hon. JAMES Q. SMITH, judge of the second judicial circuit, for an alternative writ of *mandamus*, for the purpose of compelling the judge of probate to approve the bond, and that the latter, by concealing himself, evaded the service of the writ. But this, if true, would constitute no reason for the injunction in this cause. The circuit judge had no legal right, nor had any other judge or court any right, to compel, by such a writ, the judge of probate to approve the bond in question, if he, acting under oath and charged by law with the duty of determining the question, was of opinion that the bond tendered was not good. *Ex parte Harris* (in MS.); *Ex parte Thompson* (in MS.).

In no aspect of this case can the bill for an injunction be sustained.

The decree of the chancellor overruling the motion to dissolve the injunction is reversed, the injunction here dissolved, and the cause remanded that it may be dismissed.

[Taylor v. Jones.]

Taylor v. Jones.

Trover for Conversion of Horse.

52	78
113	405
53	79
124	590

1. *Statutory separate estate of married woman; how suit for injuries to property, corpus of, must be brought.* — A complaint in trover by the husband alone for the conversion of property which is averred to be the statutory separate estate of his wife, discloses no cause of action in his favor.

2. *Arrest of judgment; when § 2811 R. C. does not apply to.* — Section 2811 R. C., forbidding the arrest of judgment for matters not previously objected to, has no application where the complaint discloses no cause of action.

APPEAL from Circuit Court of Autauga.

Tried before Hon. J. Q. SMITH.

Appellee brought this suit against appellant to recover damages for the conversion of a horse which was alleged in the complaint to be the separate statutory estate of his wife. There was a jury trial and verdict for the plaintiff, after which the defendant (appellant) moved in arrest of judgment on the ground that the complaint showed on its face that plaintiff had no cause of action against him. The court overruled the motion and rendered judgment on the verdict, and hence this appeal.

W. H. & W. T. NORTHINGTON, for appellant.

T. W. SADDLER, *contra*.

JUDGE, J. — This suit was instituted to recover damages for the conversion of personal property, alleged by the plaintiff in his complaint to be the statutory separate estate of his wife.

Under section 2525 of the Revised Code, as construed in *Pickens & Wife, v. Oliver* (29 Ala. 528), and other cases decided by this court, the wife alone can sue for the *corpus* of property thus owned by her, or for damages to the property itself as distinguished from its use.

The facts averred in the complaint clearly show that under the law of this State, which has been settled as above stated, no right of action existed in the husband for the injury complained of, — not even jointly with his wife; the right of action was in the wife alone.

This having been the aspect of the case, the judgment of the court below should have been arrested when the defendant's motion was made for that purpose. The motion was not within the influence of section 2811 of the Code, which prohibits any judgment from being "arrested, annulled, or set aside, for any matter not previously objected to, if the complaint contain a substantial cause of action;" for the complaint on which the judgment was founded contained no cause of action whatever in favor of the plaintiff. This having been the condition of the

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case, the defendant was authorized to take advantage of it at any stage of the proceedings. *Cummins v. Gray*, 4 Stew. & Port. 397.

If the defect was one which could be cured by an amendment, we would reverse the judgment and remand the cause; but inasmuch as no amendment could be made which would put the case in better plight for the plaintiff, our duty is to render a judgment here arresting and annulling the judgment of the circuit court, and dismissing the suit. Let it be so entered.

Ex parte Lambert.

Application for Mandamus.

1. *Office; a public trust.* — Under the Constitution and laws of Alabama an office is not property, but a mere public trust created for the benefit of the State and not for the advancement of the officer.

2. *Same; legislative power over.* — Unless expressly inhibited by the Constitution, the legislature has entire control over the compensation of officers, whether the office is created by statute or owes its origin to the Constitution.

3. *Art. XII. of Constitution; operation of.* — There is nothing in Art. XII. creating the "Bureau of Industrial Resources," or any other part of the Constitution, which prohibits a reduction, by a subsequent statute, of the compensation of the "Commissioner of Industrial Resources," as fixed by prior statutes at the time of his induction into office.

APPLICATION for *mandamus* renewed in this court after being refused by City Court of Montgomery, Hon. J. A. MINNIS presiding judge, upon a state of facts fully set forth in the opinion.

RICE, JONES & WILEY, for appellant. — 1. The Controlling question in this case is, whether the power of our legislature over the "compensation" of the commissioner of the Bureau of Industrial Resources is *unlimited*.

2. If it had been intended by the framers of our Constitution to leave it in the discretion of the legislature to *reduce* the compensation of the commissioner to a sum known by all fair and intelligent men to be grossly inadequate and unreasonable for the services expressly imposed upon him by that instrument, — after reasonable compensation for those services had been previously fixed at the session specified in the Constitution, — then, clearly, nearly the whole of Article XII. of that Constitution was *useless*, and "is form without substance."

"Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case a negative or exclusive sense must be given to them, or they have no operation at all. It cannot be presumed that any clause in the Constitution is intended to be without effect; and, therefore,

52	79
100	649
102	365

52	79
121	607
122	145
122	147

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such a construction is inadmissible, unless the words require it." *Marbury v. Madison*, 1 Cranch, 174, and other cases cited in foot-note to *Vallandigham's case*, 1 Wallace.

3. The elaboration of unambiguous words, and the peculiarity of collocation, found in said Article XII. of our Constitution, clearly intended more than the mere establishment of a bureau whose virtual *destruction* could be effected *indirectly* by any legislature *subsequent* to the one which had performed *its constitutional duty* of passing "such laws and regulations as may be necessary for the *government* and *protection* of this bureau, and also to *fix* and *provide for the compensation* of the commissioner."

Obviously, there is no "*protection*" for this bureau, if each legislature *subsequent* to the one which did perform *its constitutional duty* has the *unlimited power* to take away "*compensation*" (a reasonable equivalent) for the services required by the Constitution of the commissioner, and from which no legislature can relieve him.

After such "*compensation*" had been fixed by the legislature at its first session after the adoption of the Constitution, the power of a subsequent legislature over the compensation was *not unlimited*. No subsequent legislature could constitutionally reduce the compensation so fixed to a sum which courts, in the exercise of their "*judicial knowledge*," and in view of the *number and nature of the duties absolutely imposed by the Constitution upon the commissioner*, are fully convinced is *not a reasonable equivalent or recompense for the discharge of those duties*.

JOHN W. A. SANFORD, Attorney General, *contra*. — 1. Except as restrained by the state and federal constitutions, the power of the legislature is unlimited. *Dorman v. State*, 34 Ala. 216. Unless, therefore, there is some restraint imposed by the Constitution, the general assembly has unlimited control over the compensation of the "Commissioner of Industrial Resources."

2. There is no warrant in the Constitution for the position that the legislature has no power over this "compensation." It is expressly provided that the compensation of certain officers shall not be diminished during their terms; but from the class of officers thus protected the "Commissioner of Industrial Resources" is carefully excluded. This must have been done with an object. Clearly the framers of the Constitution intended to leave the general assembly power to diminish his compensation if deemed expedient.

3. If it be conceded, as it must be, that the general assembly has some discretion and control over the salary of the commissioner, by what rule can a court determine whether that discretion and control have been wisely and properly exercised?

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The general assembly is as competent to "fix" the compensation of the "commissioner" as the courts, and the courts have no authority to exercise that discretion and control for the general assembly by annulling laws reducing his compensation.

BRICKELL, C. J. — The 12th article of the Constitution declares "A Bureau of Industrial Resources shall be established, to be under the management of a commissioner, who shall be elected at the first general election, and shall hold his office for the term of four years." The duties of the commissioner are enumerated with some particularity, and the general assembly is required, at its first session after the adoption of the Constitution, "to pass such laws and regulations as may be necessary for the government and protection of the bureau, and also to fix and provide for the compensation of the commissioner." In obedience to this direction, the general assembly, at its first session, passed "An Act for the government of the Bureau of Industrial Resources," and fixed the salary or compensation of the commissioner at twenty-five hundred dollars per annum, "payable as in case of all other state officers." Pamph. Acts 1868, p. 55. The general assembly, at its recent session, reduced the salary to five hundred dollars per annum, and required the commissioner, as a condition on which his right to the salary should depend, to reside at the capital.

At the general election in 1872, the relator was duly elected commissioner, inducted into office, and when this latter act was passed, was in the performance of its duties and the enjoyment of its emoluments. Claiming a right to the salary as prescribed by the act of 1868, he applied to the auditor for a warrant on the treasury for so much thereof as was due for the month of February. The auditor, recognizing the right as claimed to so much of the salary as had accrued prior to the passage of the act reducing it, offered to issue a warrant therefor, and for the remainder of the month a warrant for so much as was due according to the last statute. This was refused by the relator, and an application was made to the city court for a *mandamus* compelling the auditor to draw a warrant for the amount of the salary according to the act of 1868. The city court overruled the application, and it is here renewed.

The grant of legislative power by the Constitution of the State is a general grant of all the legislative powers residing in the people as a sovereign community, subject only to such limitations and qualifications as are expressed in the Constitution of the State, or in the federal Constitution. *Dorman v. State*, 34 Ala. 216; *Ex parte Dorsey*, 7 Port. 293. Within the legislative power rests the creation and abolition of public offices,

[Ex parte Lambert.]

the enlargement or diminution of the duties public officers are required to discharge, and the measure of compensation they may receive. In the absence of express inhibitions in the state Constitution, the legislative power is in this respect supreme. If the Constitution creates an office, prescribes its duties, and the mode of appointment, it is not competent for the legislature to create another officer to discharge the same duties, and direct his appointment in a different manner, but it may increase or diminish the duties and compensation of the officer. *Warner v. The People*, 2 Denio, 272.

The Constitution creates the office of "Commissioner of Industrial Resources," prescribes the duties of the incumbent, but declares he shall be required "to perform such other duties as the general assembly may require." It does not fix his compensation, but commits that to the legislative power. The office, unlike the offices known to the common law, which, lying in grant, were deemed incorporeal hereditaments, has in it no element of property. It is not alienable or inheritable. It is a personal public trust, created for the benefit of the State, and not for the benefit of the individual who may happen to be its incumbent. The measure of his compensation is properly submitted to the legislative power, to be determined in view of the condition of the State, and the necessity for and importance of the discharge of the duties of the office. These will vary from time to time, and will demand as they vary a diminution or enlargement of the compensation. Whoever accepts the office, if he accepts it for the compensation only, has full knowledge of the power of the legislature, and no cause of complaint if they exercise it. He accepted voluntarily, and can voluntarily resign if the compensation is not adequate.

The Constitution creates an executive department, consisting of a governor, lieutenant governor, secretary of state, auditor, treasurer, and attorney general, all of whom are elective by the people. It declares they shall at stated times receive for their services a compensation to be established by law, which shall neither be increased or diminished during the period for which they shall have been elected. So the judges of the supreme court, circuit courts, and courts of chancery, it is declared shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office. Whenever it is contemplated that the compensation of a public officer shall be exempt from legislative control, the Constitution has so expressly declared. It has not so declared as to the "Commissioner of Industrial Resources," but commits his compensation to the discretion of the legislative power.

It has been urged that the courts must know five hundred
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dollars is not adequate compensation for the duties the Constitution enjoins. This seems to us an imputation of judicial knowledge which it would be difficult to support on principle or authority. If we were charged with such knowledge, and should esteem the compensation prescribed inadequate and unreasonable, we would be powerless to correct the evil. No court has power to set aside or disregard a law, because it is supposed to conflict with sound morality, natural right, or abstract justice. If it cannot be clearly seen that the general assembly has transcended its power, or violated some provision of the federal Constitution, the duty of the courts is obedience to its enactments.

We can reach no other conclusion than that the relator's compensation was subject to diminution at the will of the legislature, and that after the passage of the act reducing it, the auditor could not legally draw a warrant except for the sum it fixes. The application is therefore denied.

Pittman *et al.* v. Corniff *et al.*

Real Action in Nature of Ejectment.

Ejectment; construction of deed. — A warranty deed, upon full payment of purchase-money, conveying to an administrator, as such, "in trust for the absolute use and benefit of such estate and those interested therein," lands his intestate had purchased and partly paid for, vests no such title in the heirs as will enable them to maintain ejectment against a purchaser at a sale by the administrator *de bonis non*, under order of the probate court. (Following and adhering to *You v. Flinn*, 34 Ala. 409.)

APPEAL from Circuit Court of Montgomery.

Tried before Hon. JAMES Q. SMITH.

The facts are sufficiently stated in the opinion.

HERBERT & MURPHY and BUELL & BULLOCH, for appellants.

WATTS & TROY, *contra*.

JUDGE, J. — The principal question to be decided in the present case is, whether the plaintiffs in the court below had such a title in the premises sued for as would authorize them to maintain a real action for their recovery.

Jeremiah Pittman, the ancestor of the plaintiffs, purchased the premises, together with other real estate adjoining, from one Alfred V. Scott, in the year 1859, paid part of the purchase-money in cash, and gave his three promissory notes for the balance of the purchase-money, payable respectively one,

[Pittman v. Corniff.]

two, and three years from date. Pittman died after his purchase, and one A. J. Noble duly administered on his estate. During the time of Noble's administration, he, as such administrator, paid to the executor of said Scott who had also died, the full amount of the balance due of the purchase-money, and thereupon the executor of said Scott executed to the said Noble, as administrator of the said Pittman's estate, a deed of conveyance of the premises, with full covenants of warranty. It is recited in the conveyance that the premises are conveyed to said Noble, as such administrator, "in trust for the absolute use and benefit of said estate, and those interested therein." Subsequent to the execution of the conveyance to Noble, he resigned his office of administrator of the estate, and one William G. Waller became his successor as administrator *de bonis non*. During Waller's administration he sold the premises, under an order of the probate court of Montgomery county, as the property of the estate of Pittman. Waller died before the commencement of this suit, and at the time the suit was brought there was no administrator of Pittman's estate, and the estate was solvent.

It is contended by appellants that, under the facts above stated, they should have been permitted to recover the premises sued for, by virtue of section 1576 of the Revised Code. That section is as follows:—

"No use, trust, or confidence can be declared of any land, or of any charge upon the same, for the mere benefit of third persons; and all assurances, declaring any such use, trust, or confidence, must be held and taken to vest the legal estate in the person or persons for whom the same is declared, and no trust or interest can vest thereby in any trustee."

The section of the Code immediately following is in these words:—

"Nothing in the preceding section contained shall prevent the conveyance of real or personal property, or the issues, rents, and profits thereof, to another, in trust for the use of the grantor, or of a third person, or his family, or for any other lawful purpose; but in such case the legal title vests in the trustee."

These sections of the Code were construed by this court, in *You v. Flinn*, 34 Ala. 409. The conclusion there attained in reference to them was thus announced by the court: "We do not hesitate to declare that section 1306 of the Code [§ 1576 Rev. Code] converts into legal estates in the beneficiary all titles and interests in lands, where the nominal title is vested in a naked or dry trustee,—one who is not placed in possession, and who is required to perform no duties,—and where the instrument creating such nominal title *declares a use, trust, or*

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confidence for another, to the same extent as if the deed or conveyance had been made directly to the beneficiary. On the other hand, it has no application to the conveyances of either real or personal property, although the conveyance may declare that it is in trust for the use of the grantor or another; provided the trustee is charged with the control, management, or other active duties in regard to the trust fund. This latter class falls under [Rev. Code, § 1577] section 1307."

This exposition of the two sections, which we adhere to, shows that the plaintiffs were not entitled to recover in this action. The effect of the conveyance to Noble was not to make him a naked or dry trustee; the phraseology employed in the instrument forbids such a conclusion. The trust created was "*for the absolute use and benefit of the estate, and those interested therein.*" Creditors, as well as heirs and distributees, are interested in an estate; and an administrator, under our statutes, may have active duties to perform in relation to lands of the estate he represents, whether the title be legal or equitable.

The circuit court, on the request of the defendants, charged the jury, if they believed the evidence, to find for the defendants. There was no error in this.

Let the judgment be affirmed.

Killam's Heirs v. Costley, Administrator.

Petition for Removal of Administrator.

1. *Administrator; cause for removal of.* — The payment by an administrator of his own debt out of the funds of the estate is a breach of trust, for which he may be removed.

2. *Same; when should not be removed.* — Where, however, the interest of those concerned in the estate has not been imperilled by the amount used, which was small in comparison with the funds remaining in the administrator's hands, and no improper or dishonest motives can be imputed to him, he should not be removed.

APPEAL from Chambers Probate Court.

The facts are stated in the opinion.

W. H. DENSON, for appellant.

J. J. ROBINSON, *contra*.

BRICKELL, C. J. — This was an application to remove the appellee from the administration of the estate of James W. Killam, deceased. The application is very vague and uncertain in its averments, but without objection to it a hearing

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was had on the evidence offered in its support, and in defence. The only act of maladministration, which the evidence tended to prove, was the application of one hundred and eighty-six dollars of the proceeds of the sales of real estate, made by the administrator, and reported to the court of probate, to the payment of his individual debt. The aggregate amount of the sales was nine hundred and twelve dollars, and was received by the administrator a few weeks before the application for his removal. The solvency of the administrator, and the sufficiency of the sureties on his bond, were not disputed.

The payment of his individual debt, with the moneys in his hands to be administered, was certainly a breach of the trust, and a violation of the duty imposed by law on the administrator. Thereby he rendered himself and the sureties on his official bond chargeable to creditors, if any, of the intestate, and to the distributees, to the extent of the indebtedness extinguished, or the amount of money used. The creditor receiving it from him, with knowledge that it was trust funds, became also chargeable as participating in the *devastavit*. This is true, without regard to the magnitude or insignificance of the trust fund so misapplied. Such use of the funds in his hands is maladministration, and if it imperils the interest of the *cestui que trust* (the creditors or next of kin of the intestate), or is accompanied by circumstances indicative of a dishonest, selfish, or improper motive on the part of the administrator, would not only justify, but demand his removal from the trust. When, however, the amount of the trust fund so employed is small, when compared with the aggregate value of the trust estate in the hands of the administrator, and the interests of the *cestuis que trust* are not imperilled, and no improper motive can be attributed to the administrator, it would be harsh in the extreme, and not necessary to the redress of injury, to remove him from the administration because of such use. No injury can result to those having interests in the administration, because of the application the administrator has made of the funds in this case. These do not appear to be creditors, thereby delayed in the payment of their debts. The distributees have not been deferred in the settlement of the estate, and the ascertainment and collection of their respective shares. If the administrator had retained the moneys he so applied, and not commingled them with his own funds, they would have lost interest thereon until a settlement was made; and on the settlement, the administrator would have been charged with the money. The bond of himself and sureties would be the only security of the distributees for the payment to them of the moneys. The evidence that the administrator had received and is chargeable with the moneys would

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not have been more complete or conclusive than it now is — indeed it would have been the same — his report that he had received the money. While a trustee should not be encouraged in such a misapplication of trust funds, and thereby places himself in an attitude not invoking the favorable consideration of the court, it should not be made a cause of removal, when the interests of creditors or distributees are not endangered, nor their just rights delayed, and it is unattended with any circumstance indicating an improper intent on the part of the administrator. It is not every technical maladministration, or *devastavit*, that will authorize the removal of an administrator. It must be a *devastavit* involving actual, or the reasonable apprehension of injury, or attended with circumstances indicative of fraud.

The failure to make and return an inventory is one of the specific grounds for removal expressed in the statute. Yet in the case of *Hubbard v. Smith* (45 Ala. 516) it was held that when the failure to file an inventory was not wilful, and no detriment had ensued to the estate, it was not cause of removal. We regard that decision as supporting the principle we have announced. The judgment of the court of probate was in accordance with this opinion, and is affirmed.

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Application for Mandamus.

1. *Official bond; approval of, power judicial, and how not controlled.* — The approval of official bonds, under the statutes of this State, is the exercise of judicial, not of ministerial power, and *mandamus* will not lie to revise the exercise of the power. (*Overruling Ex parte Candee*, 48 Ala. 586, and *State ex rel. v. Ely*, 43 Ala. 386.)

2. *Mandamus; when will not lie.* — *Mandamus* is not the proper remedy to try the right to a public office of which there is a *de facto* incumbent. Nor will it lie in any case to compel the performance of duty or exercise of power, unless the relator has a clear legal right to demand it, and is without any other adequate and specific remedy.

3. *Officer de facto; title of, not tried by mandamus.* — One appointed by the governor to an office, to fill a vacancy duly certified and caused by the failure of the person elected to file a bond within the time prescribed by law, upon qualifying and entering upon the discharge of the duties of the office, becomes an officer *de facto*, and his title can be tried only on *quo warranto*, or information in the nature of *quo warranto*. *Mandamus* is not the remedy.

THE judge of the first judicial circuit (Hon. GEORGE H. CRAIG) having refused to approve the official bond tendered him by the relator, George E. Harris, he now applies to this court for a *mandamus* to compel him to do so. The issuance of a rule *nisi* was waived, and the following facts agreed upon, which were to be taken as if shown in answer to the rule: —

52	87
100	607
100	649
52	87
115	589
52	87
180	184

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At the last general election relator was duly elected sheriff of Hale county. The count of votes cast at that election, in the county of Hale, was not finished until the 10th day of November, seven days after the election. Returns of the election were then made by the supervisors to the secretary of state, but were not received by him until the 20th day of November. On that day he issued notice of the election to the persons elected, and among others to the relator, as provided by the 54th section of the election law of 1873. On the 19th day of November the probate judge certified to the governor that the relator had failed to file in his office an official bond as sheriff. On November 25th the governor appointed and commissioned one Tucker as sheriff of the county, who executed an official bond, approved by the judge of the first judicial circuit, and the same was filed in the probate judge's office on the 1st day of December, when said Tucker qualified and entered upon the discharge of the duties of the office. On the next day the relator presented to the judge of the first judicial circuit his official bond as sheriff, sufficient in form and sureties, and demanded its approval, which was refused, because more than fifteen days had elapsed since his election.

SMITH & ROULHAC for petitioner. — 1. Petitioner could not enter upon the office before he had given bond and taken the oath of office. His bond could not be filed until approved. To demand the approval of it, he must show that he has been elected, and the legal evidence of the election is his *certificate*. The balloting merely is not the election; the *certificate* is the evidence upon which the person elected and the officer approving the bond must act. Until the certificate issues, there is no evidence of the election. Construing the act of August 1st, 1868, requiring the circuit judge to approve the bond, with the requirement of the election law, it must be held that the time within which the bond is to be given commences to run only from the issue of the certificate of election. *People v. Maywoon*, 5 Mich. 150; *People v. McManus*, 34 Barb. 620; *State v. Steen*, 14 Mo. 223; 16 Michigan, 56. Otherwise the law will hold the candidates, and the judge who is to approve the bond of the officer elect, to a knowledge of facts, the ascertainment of which is prescribed by certain evidence, long before the officers charged with that duty have themselves ascertained and declared the result.

2. *Mandamus* is the only remedy petitioner has. *Ex parte Candee*, 48 Ala. 386. *Sprowl v. Lawrence*, 33 Ala. 674; *Wammack v. Holloway*, 2 Ala. 31.

JNO. T. WALKER, *contra*. — 1. The law expressly requires
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the bond to be filed "within fifteen days after the election." The argument of inconvenience is not sound. Under the Constitution an officer, by reason of the loss of his certificate in transmission through the mails or other cause, might be prevented from qualifying for a considerable time; yet his *term* would not thereby be lengthened. The sheriff's term begins to run from the day of his election. The "certificate" is not the *election*, but merely evidence of it, and the fifteen days commence to run from the *election*. 9 Kansas, 327; 48th Ga.; 19 Howard, 79.

2. Although this court in 43d Ala. (*State ex rel. v. Ely*) has decided that *mandamus* is the proper remedy in a case like this, it is submitted that the weight of authority is against the decision. The decision in the *mandamus* case does not bind the contestant who is in office.

BRICKELL, C. J. — To warrant the issue of a *mandamus*, the relator must show that he has a clear legal right to the performance of the duty or the exercise of the power sought to be compelled. The existence of a substantial doubt as to the right or power of the officer who is to be coerced to perform the particular duty, or to do the particular act, forbids compulsion by *mandamus*. High. Ext. Rem. § 32. Nor will a *mandamus* be awarded on an inchoate legal title. *Thomason v. The Justices*, 3 Humph. 238. At an early day in this State, it was determined that *mandamus* is not a proper remedy to try the right to a public office of which there is a *de facto* incumbent. The proper and adequate remedy is by *quo warranto*, or an information in the nature of a *quo warranto*. *Mead v. Dane*, Minor, 46. This decision is supported by the great weight of authority. High. Ext. Rem. § 49 *et seq.* The reason of the rule is apparent. A *mandamus* lies only in the absence of any other adequate and specific remedy for the grievance of which complaint is made. The existence of such remedy is a complete answer to the application. 2 Brick. Dig. 240, § 4. A *quo warranto*, or an information in its nature, is the appropriate and the only adequate remedy, for the ouster of the *de facto* officer and the induction or restoration of the *de jure* officer. High. Ext. Rem. §§ 49-77; Dillon on Munic. Cor. §§ 211, 680, 714. Another reason is, that the writ cannot be addressed to the incumbent of the office. He has not power to admit to the office. Not having power to do that which is sought by the writ, he cannot be heard on the application for its issue. On the application for the writ, as he is not, and cannot be a party, his right to the office cannot be adjudicated. A *quo warranto*, or an information in its nature, would be directed to him, and would command him

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to exhibit his authority or warrant for holding the office. The judgment rendered would be against him, — a judgment of *ouster*, and a judgment inducting another into the office. An officer in office, under a commission issued by the governor, who is clothed with the power of commissioning all public officers, is at least an officer *de facto*. His title and his acts as an officer are valid, and cannot be indirectly or collaterally impeached. If his authority is disputed, it must be in a direct proceeding to which he is a party, and which will finally adjudicate the right to the office. 2 Brick. Dig. 289, §§ 18, 19.

The approval of official bonds is, by the law of this State, intrusted to judicial officers, except as to particular state officers, whose bonds are to be approved by the governor. It does not necessarily follow that the power is judicial, and not ministerial, because it is conferred on judicial officers only. It was said in *Marbury v. Madison*, by C. J. MARSHALL (1 Cranch, 170), and has often been announced in this court, that "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a *mandamus* is to be determined." *Tenn. & Coosa R. R. Co. v. Moore*, 36 Ala. 371; *State v. Ely*, 43 Ala. 568; *Nichols v. Comptroller*, 4 Stew. & Port. 154; *Ex parte Candee*, 48 Ala. 386. When power is conferred only on judicial officers, and it is difficult to determine on which side of the often shadowy line, separating judicial from ministerial power, it lies, it is rather indicative of a legislative intent that the general assembly regarded and intended the particular power as judicial. Without, however, laying any stress on the fact that the power of approving official bonds is intrusted only to judicial officers, we cannot doubt, that under our statutes it is in its nature strictly judicial. The officer approving must prescribe the penalty of the bond. Pamph. Acts 1868, p. 8, § 5 (continued in force, Pamph. Acts 1872-73, p. 29, § 55). The bond of a sheriff or clerk of the circuit court, or of a judge of probate, must be in a penalty sufficient to furnish adequate security for the performance of his duties. The extent of these, and the magnitude of the pecuniary interests dependent on them, are to be considered in prescribing the penalty. A penalty graduated to these, in one county, and just and reasonable there, would be unjust and oppressive in another county, where the duties were less, and the pecuniary interests dependent on their performance less in value. In view of this, prescribing the penalty of an official bond involves judgment and discretion, to be exercised for the protection and security of the public and the individual citizen. The form of an official bond, its condition and obligation, are prescribed by law. Whether a bond offered conforms in this respect to the requisition of the law, the officer

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must determine before approving. He is forbidden to approve, if the bond does not conform to the statutory requisition. R. C. § 159. Can it be said, that in determining the sufficiency of a bond in this respect, ministerial and not judicial power is exercised? Some of the most difficult questions which have been the subject of investigation and decision in this court were whether bonds, sometimes official, sometimes taken in the course of judicial proceedings, conformed to the statutes authorizing them, and were to be esteemed statutory bonds, or valid only as common law obligations. He must also inquire into and pass on the solvency of the obligors. This requires the hearing and weighing of evidence. If he should adjudge them insufficient, the exercise of his judgment will not be controlled by *mandamus*. *State v. Bowen*, 6 Ala. 511. If in the exercise of the power of approval, however erroneous his action, in the absence of statutory provisions subjecting him to liability, he is exempt on the common law principle, which protects a judge from liability to suit or indictment for judicial acts or omissions. *Lester v. Governor*, 12 Ala. 624; *Hamilton v. Williams*, 26 Ala. 527. We therefore must pronounce that the approval of an official bond is the exercise of power in its nature judicial, not ministerial. A different conclusion was attained in *State v. Ely*, 43 Ala. 568; and in *Ex parte Candee*, 48 Ala. 386, on reasoning not satisfactory to us. We concur, as has already been said, in the proposition stated in the case last cited, that it does not follow a duty or power is judicial because it is to be performed by a judge. It is the nature of the power itself — what it involves — that determines its character. When the power involves judgment and discretion in its exercise, it is judicial, not ministerial. It is said in this case, that “a judge of the circuit court may issue an attachment, and in doing so he is required to take a bond, with sufficient sureties; in other words, he must approve of the bond and judge of the sufficiency of the sureties. In doing this, he does not perform a judicial duty, for the same thing may be done by the clerk of his court.” If the power is to be deemed ministerial, because it may be exercised by a ministerial officer, as is here indicated, it would seem a departure from the principle announced in a previous part of the opinion, that it is the nature of the power, and not the officer exercising it, that is material in fixing its character. Apart from this, it has been decided by this court that the issue of an attachment by the clerk of a court, a ministerial officer, *was the exercise of power in its nature judicial*. *Matthews v. Sands*, 29 Ala. 138. We are reluctant to depart from former decisions. Such departures produce uncertainty in the administration of justice, disturb confidence in judicial decisions, provoke

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litigation, and excite a sense of insecurity in the transaction of business. If, however, we cannot doubt that the law has been misapprehended, and are impressed with the conviction that serious public injury will result from an adherence to former decisions, we feel bound to return to the law as we believe it should have been declared. We have given our reasons fully for the conclusion that the power under consideration is judicial. If the judicial officers charged with its exercise are in its performance to be converted into mere ministerial officers, subjected to the liability of such officers, vexed with private suits for acts or omissions in its exercise, their independence is endangered, and the wise public policy which has exempted them from suit is violated. We feel constrained to overrule on this point the cases to which we have referred.

The statute requires the official bond of a sheriff to be filed in the office of the judge of probate. R. C. § 814. It is further declared that official bonds required to be filed in the office of the judge of probate must be filed therein within fifteen days after the election or appointment of the officers required to execute them. R. C. § 162. The failure of an officer to file his bond within the time prescribed vacates his office; and it is the duty of the officer in whose office such bond is to be filed, "*at once to certify such failure to the appointing power, and the vacancy must be filled as in other cases.*" R. C. § 164. Vacancies in the office of sheriff are filled by the appointment of the governor. Const. Art. V. § 21. The circuit judge, deeming the relator had vacated his office by failing to file his official bond within fifteen days after his election, refused his approval of the bond tendered by the relator. If we should award a *mandamus* to compel an approval, we would on this application revise his decision on this grave question. This is not the office of a *mandamus*. A *mandamus* is a compulsory, not a revisory writ. It lies to compel, not to revise or correct action, however erroneous it may have been. *Inman v. Commis's Court*, 21 Ala. 772; High. Ext. Rem. §§ 34, 46. The refusal to approve the bond was action, as essentially as approval would have been. The judge was bound to refuse, if the bond was tendered by one who had not a right to the office; for while he does not by approving or disapproving determine or affect the title to the office, and is not required to take evidence in reference to the title, it is only he who has a clear legal right to the office who can demand the approval of a bond. If the officer should erroneously refuse to approve the bond of him who had the title to the office, or should approve the bond of one without title, the refusal or approval would not affect or in anywise impair the true title. Can it be said the relator has a clear legal right to an approval of an official bond, in the face

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of a statute declaring he has vacated his office by a failure previously to file his official bond? The statute certainly casts a cloud on his title, which the approval of his official bond would not remove. We are aware of what was said as to the construction of this statute in *Sproul v. Lawrence*, 33 Ala. 674; *State v. Ely*, *supra*, and *Ex parte Candee*, *supra*. When the question shall directly arise, we will not feel bound to follow these decisions, if they are not in this respect *dicta*. All we say now is, that on this application we will not reverse the judgment of the circuit judge refusing the approval of the relator's bond, because in refusing he was in the exercise of judicial power, and because we cannot declare the relator shows a clear legal right to the approval of an official bond.

Again, it appears the office is now filled by a *de facto* incumbent whose official bond has been approved. He is in office by virtue of a commission from the governor. That commission is conclusive evidence of the title to the office, until it is impeached on *quo warranto*. In that proceeding it is only *prima facie* evidence, liable, like other *prima facie* evidence, to be counterbalanced. *Hill v. State*, 1 Ala. 559; *Brightly's Election Cases*, 319, 313. The office is filled by a *de facto* incumbent, having the legal muniment of title, which is conclusive until impeached in a direct proceeding. It would be vain and useless to approve the official bond of another. Such approval could not entitle him to the office. It would not authorize him to oust the present incumbent, and enter on the duties of the office. He is not entitled to the approval unless he has a claim to the office. If he has such claim, there is a legal remedy for its enforcement, and when enforced by that remedy, the approval of his official bond will follow. In *Hill v. State*, *supra*, it is said, the executive is the department of the government through which its officers are made known to each other, and to the people, in the absence of a judicial investigation. But the giving of a commission to one who has no right to the office will not destroy the title of him who has the legal claim; its only effect is to oust him of his franchise in the office, until his title to it shall be judicially determined. The commission of the governor compels every court in the State to take judicial notice of the fact that the office of sheriff of the county of Hale is filled, and who is its incumbent, when his term of office commenced, and when it will expire. *Ragland v. Winn*, 37 Ala. 32; *Saltonstall v. Riley*, 28 Ala. 164. Charged with this notice, the judge of the circuit court properly withheld approval of an official bond tendered by another.

There is no point of view in which we can regard the relator as entitled to a *mandamus*, and it is refused at his costs.

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Detinue for Sewing-machine.

Action by owner, against purchaser from stranger in possession, without title; what necessary to defeat. — A purchaser of a sewing-machine from one in possession, but without title, cannot defeat a recovery by the owner, unless he shows a bonâ fide purchase, for valuable consideration, without notice.

APPEAL from Circuit Court of Calhoun.

Tried before Hon. W. L. WHITLOCK.

Detinue by Sumner against Woods to recover a sewing-machine. Sumner had previously delivered the machine to one J. W. Smith, then residing in Calhoun county, who executed four promissory notes therefor on 22d January, 1873, falling due respectively four, eight, twelve, and eighteen months after date. Each of these notes states that it was given for value received, and is payable only on presentation, subject to the conditions on the margin of the notes. This condition is thus expressed on the first three: "It is agreed between the maker of this note and A. Sumner that the Wheeler & Wilson sewing-machine for the use of which, to the maturity thereof, this note is given, is and shall remain the property of A. Sumner, and that in default of payment said machine shall be returned to said Sumner, his agent, or attorney." The condition on the fourth note is, that "the machine for the use of which, to the maturity thereof, this note is given, shall, upon payment of this and all prior notes given for the use of said machine, become the property of the maker of the note." Suit was commenced July 7th, 1873. Sumner offered these notes in evidence, in connection with proof that Smith had paid none of them in full, and had made only a small partial payment on one of them, and that the machine was in possession of the defendant, who, on demand, refused to deliver it up. Defendant testified that he bought the machine from one Dunn, who resided at Patona, in Calhoun county, and paid him sixty-five dollars in cash for it. This was all the evidence. The court, of its own motion, charged the jury that the plaintiff could not recover "unless the notes and agreements were properly recorded in the office of the probate judge of Calhoun county, and that there being no proof of such recording they could not find for the plaintiff."

The plaintiff excepted to this charge, and here assigns it for error.

TURNLEY & SON, for appellant.—The transaction was but a conditional sale, the title not passing until the agreement was

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performed. 2 Ala. 542. The only way in which a purchaser can get title, where his vendor had none, is by a *bonâ fide* purchase for valuable consideration without notice. According to our decisions the burden is on the purchaser to show this. The charge given reverses this rule and puts this burden on the owner. It is, therefore, erroneous, even if the proof shows Woods to be a *bonâ fide* purchaser without notice.

FOSTER & FORNEY, *contra*. — Appellee paid valuable consideration to one in possession claiming ownership. This is sufficient proof of ownership and title. Sumner's notes were not recorded, and there is no evidence showing that appellee was put upon inquiry by anything as to the title to the machine. Appellee was a *bonâ fide* purchaser for value without notice, and his title must prevail over Sumner's. 4 Mass. 405; 17 Mass. 605; 1 Selden, 41; 6 Johns. Ch. 437; 1 Paige Ch. 312. By the peculiar terms of the agreement the notes could be paid only on presentation. Until presented and payment refused, Sumner was not entitled to possession. The suit was brought before the second note fell due, and no presentation was proved. In no aspect was plaintiff entitled to recover, and the charge given, if erroneous, is error without injury.

JUDGE, J. — The transaction between Sumner and Smith was not a bailment, but amounted to a conditional sale. The seller did not retain the possession of the property, but was to retain the title to the same, after he had transferred the possession to the buyer. It is well established that when there is a condition precedent attached to a sale, the title will not pass until the condition is performed, unless there be a waiver of its performance by the vendor. *Caraway v. Wallace*, 2 Ala. 542. But the great mark of ownership of personal property is *possession*; and when a contract is made by which it is intended that the property should be apparently in one, while it is in fact in another, the world has a right to suppose that the one in possession is the owner; and such a contract cannot be set up to the prejudice of *bonâ fide* creditors and purchasers without notice. As has justly been said, "such contracts are out of the usual course of business, unnecessary, and directly tend to the injury of those who are not in the secret." *Martin v. Mathiot*, 14 Serg. & Rawle, 214.

In the case before us, the defendant in the court below, after the plaintiff had closed his evidence, testified in his own behalf, that he had bought the machine sued for from "one Dunn," at Patona, in Calhoun county, where Dunn lived at the time, and paid him therefor the sum of sixty-five dollars in cash. This was all the evidence introduced by the defendant. The

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court charged the jury that the plaintiff was not entitled to recover unless the instruments evidencing the contract had been properly recorded in the office of the probate court of Calhoun county. In this the court erred. It was incumbent upon the defendant to show that he was a *bona fide* purchaser *without notice*. This he failed to do; and for the above named error of the court the judgment must be reversed and the cause remanded.

Shelburne *et al.* v. Letsinger.

Bill to foreclose Equitable Mortgage.

1. *Equitable mortgage; how created and enforced.*—An equitable mortgage of personalty, enforceable in a court of chancery, may be created by verbal agreement.

2. *Same; proof necessary to establish.*—The party seeking to establish such a trust must prove its existence by clear and convincing proof. Casual and indefinite expressions will not suffice. The evidence in this case held insufficient to establish such a mortgage.

APPEAL from Chancery Court of Lawrence.

Heard before Hon. WILLIAM SKINNER.

The point decided sufficiently appears from the opinion.

WILLIAM COOPER, for appellant, analyzed the testimony, contending that it was vague and uncertain and did not authorize the decree. He cited numerous authorities to the effect that the proof must be most convincing to authorize a court to set up and enforce such an agreement; among them the following: 20 Ala. 753; 18 Ala. 353; 21 Ala. 103; Story's Equity, § 764; Bullard & Tiffany on Trusts, 15; Washburn Real Estate, 91.

WATTS & WATTS, *contra*.

JUDGE, J.—The bill in this case was filed by the appellee to foreclose an equitable mortgage on personal property claimed to have been created by a verbal agreement made between the complainant and Thomas R. Shelburne in his lifetime. The chancellor decreed the relief prayed and ordered a sale of the property.

It is well settled that an equitable mortgage of personal property may be created by a verbal agreement; and that such an agreement, when made on a valuable consideration, will be enforced in a court of equity. *Morrow v. Turney's Adm'r*, 35 Ala. 131; *Brooks v. Ruff*, 37 Ala. 371.

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And it is equally as well settled that to establish such a trust, the evidence must be clear and convincing. Casual or indefinite expressions are insufficient for such a purpose. *Tiffany on Trusts*, 15; *Adams's Equity*, 157; *Aday v. Echols's Adm'r*, 18 Ala. 353; *Hattan v. Lundman*, 28 Ala. 127.

In looking at the testimony relied upon by complainant to make out his case, we find that he proved by one witness the declarations of Shelburne, that he had obtained money from the complainant "by giving up everything he possessed;" that he would "belong to the complainant that year;" and that "everything he owned belonged to the complainant, unless he should pay him the money he had borrowed from him." Complainant also proved by another witness that Shelburne told the witness that he had "pledged to the complainant everything he had to get money to purchase supplies to run him another year;" and another witness still testified that Shelburne told him that he, Shelburne, would "belong to the complainant," until the money he had borrowed from him was paid. These and other declarations of Shelburne made in connection therewith, but which do not add materially to the strength of complainant's case, constitute the principal evidence on which complainant relies to prove his mortgage.

The defendants introduced the testimony of several witnesses who testified to the declarations of the complainant, made at different times, to the effect that he had taken no lien or mortgage from Shelburne to secure his debt.

Thus it will be seen the testimony is conflicting; but independent of such conflict, that of the complainant is very imperfect and unsatisfactory. No witness testifies to the distinct existence of a contract or agreement between the parties, giving a lien or mortgage on any specific property of Shelburne in favor of the complainant, although the evidence shows that several persons, other than the alleged contracting parties, were present, or near by, when the alleged agreement was made. It is reasonable to suppose that if such an agreement had been made, some person would have been called upon to witness it. As it is, the whole testimony on this subject rests upon vague declarations made in casual conversations.

Our conclusion is, that the decree of the chancellor must be reversed, and the bill dismissed. The appellee must pay the costs of this court and of the court below.

[Ex parte Thompson.]

*Ex parte Thompson.**Application for Mandamus.*

1. *Approval of official bonds; exercise of judicial power.* — The statutes of this State, in regard to the approval of official bonds, confer upon the officers intrusted with that duty judicial, not ministerial power, the exercise of which cannot be revised by *mandamus*. (*Ex parte Harris*, ante, p. 87, reëxamined and reaffirmed.)

2. *Power; when judicial.* — A power is judicial, or in its nature judicial, when it involves the exercise of judgment and discretion; is to be exercised only in an ascertained event and on the concurrence of particular facts, the existence of which must be determined by the officer intrusted with the execution of the power.

3. *Semble*, that *mandamus* would lie if the refusal to approve an official bond proceeded from mere arbitrariness, whim, or caprice.

THIS was an application for *mandamus* to compel the judge of the ninth judicial circuit (Hon. J. E. COBB) to approve relator's official bond as probate judge of Macon county, which the circuit judge had refused to do, because he deemed the sureties insufficient for reasons stated in his return, which it is not necessary to set forth here.

RICE, JONES & WILEY and GUNN & PAINE, for petitioner.

STONE & CLOPTON, ABBINGTON & GRAHAM, HOLT & ABERCROMBIE, *contra*.

BRICKELL, C. J. — The judge of the ninth judicial circuit, upon the address of four members of the court of county commissioners of the county of Macon, required the relator to give an additional bond as judge of probate of said county. The relator tendered an additional bond, which the judge refused to approve, because he deemed the sureties insufficient. A *mandamus* to compel him to approve is moved for by the relator.

Unless the court departs from the decision made at the present term in *Ex parte George E. Harris*, the application must be refused. We have carefully reconsidered that decision, and have reëxamined the authorities on which it rests, and many others, some in harmony, others conflicting with it. The questions decided in that case, so far as they affect this, are, that the approval of official bonds, under the statutes of this State, is the exercise of judicial, not of ministerial power; and that *mandamus* will not lie to revise the exercise of the power. We cannot attain any other conclusion.

It may not always be easy to ascertain the real character of a statutory power intrusted to a judicial or ministerial officer. When the power is clearly defined and enjoined, does not involve the exercise of discretion or judgment, and no alternative

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is left to the officer charged with its execution ; when he must act without inquiry, and without evidence, and the mode of action is expressly declared, the power is purely ministerial. When, however, the power involves the exercise of judgment and discretion ; when it is to be exercised only in an ascertained event and on the concurrence and existence of particular facts, and the officer charged with the execution of the power must determine whether the event has arisen, or the facts exist requiring its exercise, then the power is judicial, or in its nature judicial.

A reference to some of the cases in which *mandamus* has been awarded, and some in which it has been refused, will aid in determining the nature of the power of approving official bonds as prescribed in the statutes of this State, and whether the writ is a proper remedy to revise the action of the judge intrusted with the power, in granting or withholding approval. The governor of the State was required, when a railroad company complied with certain terms expressed in an act of the legislature, to draw his warrant on the treasury in favor of the company for a certain sum. The terms were complied with, but the governor, supposing the act was modified or repealed by a subsequent statute, refused on application to draw the warrant. This court holding the first act was a legislative grant to or contract with the company, incapable of repeal or modification without its consent by any subsequent statute, and that the duty imposed on the governor was merely ministerial, which could as well have been devolved on a subordinate or inferior officer, awarded a *mandamus* compelling him to draw the warrant. *Tenn. & Coosa R. R. Co. v. Moore*, 36 Ala. 371. It will be observed, that in the case no question of fact was presented. The facts were uncontroverted, and there remained no matter involving judgment or discretion, and no alternative for the governor to adopt in the exercise of this judgment. The statute was imperative ; he should do the mere manual, ministerial act of drawing a warrant for a specific amount. An act of Congress authorized the solicitor of the treasury to adjust on principles of equity claims preferred against the United States, and directed the postmaster general to credit the parties with the sum ascertained by the solicitor to be due them. A *mandamus* was awarded to compel the postmaster general to perform the mere clerical, ministerial duty of entering on the books of his department a credit of the sum ascertained by the solicitor. *Kendall v. U. S.* 12 Pet. 524.

In *Life & Fire Ins. Co. v. Wilson* (8 Pet. 291) a *mandamus* was awarded to compel a judge to sign a judgment which had been rendered by his predecessor in office, his signature being necessary under the local law, the court saying, "the act of

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signing the judgment is a ministerial and not a judicial act." These are not extreme cases, and are selected only to show the character of the act, — the nature of the power it involves — the performance of which has been enforced by *mandamus*. The exercise of judgment or discretion was excluded; there was a mere naked, well-defined ministerial duty to be performed.

In *Ex parte Echols* (39 Ala. 698), an application was made to this court to compel the speaker of the House of Representatives to send to the Senate a bill, averred to have passed the House, which he refused to send, because he did not deem it had received the number of votes necessary to its passage; all consideration of the jurisdiction of the court was waived, and the writ refused, upon the specific ground that the speaker, in his refusal, was exercising power in its nature judicial, not ministerial. The court said: "It seems to be held by all the authorities, that the writ of *mandamus* can only issue to some officer required by law to perform some mere ministerial act, or to a judicial officer to require him to take action; but not in a matter requiring judgment or discretion to direct or control him in the exercise of either." The supreme court of the United States have uniformly announced this rule. The acts of Congress intrusted the superintendent of public printing with the distribution to the printers of the Senate and of the House of all matter ordered to be printed, requiring, when any document was ordered to be printed, that the printing should be done by the printer of the house first ordering it. A *mandamus* was sought to compel the superintendent to deliver a particular document to the printer of the House, on the admitted fact that the House first ordered its printing. The *mandamus* was refused. C. J. TANEY, reviewing the former decisions of the court, said: "The rule to be gathered from all of these cases is too well settled to need further discussion. It cannot issue in a case where discretion and judgment are to be exercised by the officer, and it can be granted only where the act required to be done is merely ministerial." *U. S. v. Seaman*, 17 How. 225.

All the authorities, however conflicting they may be, profess to proceed on the rules announced in these cases. A judicial officer approving an official bond under the laws of this State exercises a function more important, delicate, and responsible than that involved in many of the authorities in which the power has been declared judicial. The interests of a community depend on the fidelity with which he discharges the duty. The probate judge has the care of the estates and interests of persons not *sui juris*, the security of which rests largely on the sufficiency of the official bond, to which they may resort in

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the event of his misfeasance or malfeasance. The sufficiency of such bond can be known to the approving officer only from evidence. He must examine witnesses, and determine from their testimony whether the obligors in the bond are sufficient as sureties. I can conceive of no case in which an officer is compelled to hear evidence and to exercise judgment on such evidence, that the power, the duty he exercises, is not, to say the least of it, in its nature judicial.

If, as we must conclude, the approval of an official bond involves judicial power, then no principle of law can be regarded as better settled than that its exercise cannot be revised on *mandamus*. This writ has in it no revisory capacity; it is wholly compulsory. The supreme court of the United States say: "We are not aware of any case when a *mandamus* has issued to an inferior tribunal commanding it to reverse or annul its decision, where the decision was in its nature a judicial act, and within the scope of its jurisdiction and discretion." *Ex parte Secombe*, 19 How. 9; *United States v. Guthrie*, 17 How. 304; *Ex parte William Many*, 14 How. 24; *United States v. Commissioner*, 5 Wall. 523.

It is evident that the statutes of this State are framed with the purpose of a rigid execution of official bonds from public officers having ministerial duties to perform, affecting the public revenues or the pecuniary interests of the citizen, sufficient for indemnity against official misfeasance or malfeasance. No public officer is intrusted with such large and unchecked power over these as the judge of probate. The danger to be guarded against is not his oppression, in the strict enforcement of the statutory powers conferred on the grand jury, or the court of county commissioners, intended to compel him to give and keep good and sufficient official bonds, but that there will be a want of promptness and indifference in the exercise of these powers. He has more ample remedies to redress any injury he may sustain from an abuse of these powers than the public has to enforce their exercise.

We are not unmindful of the argument, pressed with so much force by the counsel for the relator, that a public officer may be greatly wronged by the mere capricious or arbitrary refusal of the judge to approve his official bond, if such refusal is not revisable. In every power is wrapped up a capability of abuse. The main security against its abuse rests often only in the power of public opinion — the official obligation and responsibility of the officer in whom it resides. There are many powers, the exercise of which may be productive of greater private injury than can follow a refusal to approve an official bond, depending only on judicial discretion, and not the subject of revision. A new trial may be refused when life or liberty is

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in jeopardy; the refusal may be erroneous, in gross violation of law, and there is no jurisdiction to revise. A continuance may be wrongfully, capriciously, it may be corruptly granted, until by the lapse of time testimony is lost, and the wrong is allowed to prevail when the right could have been established; and yet there is no power of revision. If the case should ever occur in which it is made to appear that the officer charged with the approval of an official bond has been so insensible to his official responsibilities as to withhold approval, from mere whim or caprice, or arbitrarily, we will not say a remedy by *mandamus* may not exist, — that then the refusal would not be in legal effect a mere refusal to exercise his power. *Commissioners of Poor v. Lynch*, 2 McC. 170; *Arberry v. Beavers*, 6 Texas, 457. When, however, it is only error which is imputed to the officer, a *mandamus* cannot be awarded to correct it.

It is due to the respondent to say, that assuming as true the facts stated in his return, in justification of the refusal to approve the additional bond tendered by the relator, he would have erred if he had not refused.

The *mandamus* must be denied.

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Appeal from Order revoking Letters of Apprenticeship.

Appeal; what order will not support. — An appeal does not lie from the order of the probate judge revoking and annulling letters of apprenticeship.

APPEAL from Probate Court of Limestone.

This was an appeal from an order of the probate judge, revoking letters of apprenticeship.

MCCLELLAN & MCCLELLAN, for appellant.

JONES & FULLERTON, *contra*.

BRICKELL, C. J. — This is an appeal from an order of the court of probate, or rather of the judge of probate of the county of Limestone, revoking and annulling letters of apprenticeship. The power and duty of apprenticing children whose parents are not of ability to maintain them is devolved on the probate judge, not on the court of probate. No judgment or decree is rendered in exercising the power. A contract is entered into, to which the judge, as the representative of the county, is a *quasi* party of the one part, and the master a party of the

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other part. A general power to revoke the letters or indenture is conferred on the judge. R. C. § 1450-3. Neither in granting or revoking the indenture is the judge exercising judicial power, but rather a police power, which could have been intrusted as well to any other county officer as to him. The whole matter involved, whether in granting or revoking the apprenticeship, depends in a large degree on the knowledge of the master, the apprentice, and his parents, which the judge may acquire from an acquaintance with them, and of which he is not required to take evidence. It is not a fit subject of litigation, or of judicial inquiry. If the power is abused, corrective remedies can be found. An appeal, which lies only from a final judgment or decree, is not a remedy. *Cox v. Jones*, 40 Ala. 297; *Carmand v. Wall*, 1 Bailey, 209; *Cooper v. Sanders*, 1 Hen. & Mun. 412; *Bryant v. Stearns*, 16 Ala. 302.

This court has not therefore jurisdiction of the matters presented in the record, and an appeal not lying therefrom the appeal taken must be dismissed.

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Action for Use and Occupation of Land.

Action for use and occupation; when will not lie. — A plaintiff in ejectment, put in possession as against a third person, cannot maintain an action for use and occupation against the tenant, by contract, of one who held the premises adversely to the parties to that suit — neither landlord nor tenant being parties or privies — although the plaintiff demanded rent of the tenant, who is not shown to have acquiesced in the claim, and thereafter made no effort to dispossess him.

APPEAL from Circuit Court of De Kalb.

Tried before Hon. W. J. HARRALSON.

Appellee, Green, brought this action against appellant, Lankford, for use and occupation of land. Under the rulings of the circuit court the jury returned a verdict for the plaintiff. There were numerous exceptions to the ruling of the court below which it is unnecessary to set forth, as the case turned upon the right of the plaintiff, under the facts stated in the opinion, to maintain the action.

M. J. TURNLEY, for appellant. — Under the facts of this case "use and occupation" will not lie. *Shumaker v. Nelms*, 25 Ala. 126; *Weaver v. Jones*, 24 Ala. 420. Appellant was not plaintiff's "tenant by sufferance." 2 Blackstone, 150.

COOPER & WALDEN, *contra*, argued that the case came within the spirit of § 2607 R. C.

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JUDGE, J. — The record of the present case discloses, in substance, the following facts: The appellee recovered the lands, for the use and occupation of which the suit is brought, in April, 1870, in a real action against one Mary Lankford, to which she made no defence. At the time of appellee's recovery, one John M. Lankford and the appellant were in the joint possession of the premises, the latter holding under a contract with the former, founded on a valuable consideration, as a "cropper," for the year 1870. Previous to the making of this contract, John M. Lankford had been in possession of the premises for many years, holding under color of title, and adversely to all the world. John M. Lankford and appellant, nor neither of them, were parties or privies to the action against Mary Lankford, which, so far as the record discloses, determined nothing but the right of the plaintiff to recover of the defendant. After the recovery against Mary Lankford, the sheriff, with a writ of *habere facias possessionem*, rode over a field on the premises in company with the appellee — no other person being present — and told him that he put him in possession under said writ; both then rode off together. Subsequently, in the month of June, 1870, appellee gave notice to the appellant in writing, sent by a third person, that he would claim rent of him for the premises; but there was no evidence that appellant ever, at any time, acquiesced in, or acknowledged the rightfulness of his claim. Appellee testified that he suffered appellant to remain on the premises by making no effort to dispossess him.

An action for the use and occupation of lands could not be maintained at the common law. Wherever the right to maintain such an action exists, it is conferred by statute. Our own Code prescribes when the action may be maintained in this State. It is when the demise is by deed or parol, and no specific sum is agreed on for rent; when the defendant has been let into possession on a sale of lands, which he has failed to consummate; and when the tenant remains on the land by the sufferance of the owner. Rev. Code, § 2607.

It is contended that the facts of the present case authorize the appellee to maintain this action, under the section of the Code above quoted, on the ground that appellant remained on the land by the sufferance of appellee as the owner. We are unable to give our assent to this view. Appellant was never constituted the tenant of appellee by a demise express or implied. On the contrary, he entered under and upon an express contract on valuable consideration, by which he became liable to another; and an implied promise to one cannot be raised in the face of an express promise to another for the same consideration. *Shumaker v. Nelms*, 25 Ala. 126.

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The ruling of the circuit court upon this question was in conflict with the views expressed in this opinion; and deeming it unnecessary to notice any other question presented by the record, we direct that the judgment be reversed and the cause remanded.

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Summary Proceeding against Sheriff and Sureties.

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1. *Demurrer; when must be overruled.* — Under our statutes a demurrer to pleadings, which, though defective in other respects, are not obnoxious to any of the specified grounds, must be overruled.

2. *Motion in summary proceeding; when demurrable.* — The motion in a summary proceeding against the sheriff and his sureties, for his failure to make money on an execution, should disclose the name of all the parties against whom judgment is sought, and failing in this is bad on demurrer.

3. *Same; when judgment against sureties erroneous.* — Where the sureties neither appear nor plead, judgment cannot be rendered against them, without proof of the suretyship.

4. *Same; amount of damages allowed.* — Ten per centum damages on the amount of the execution and interest is the maximum allowed by law in this proceeding.

5. *Sheriff's return; amendment of.* — The sheriff may amend his return so as to make it speak the truth, and the amendment when made relates back to the date of the original return, and is substituted for it.

6. *Residence; presumption as to.* — Residence or non-residence is a fact in its nature continuous, and when once proved to exist, will be presumed to continue until the contrary is made to appear.

7. *Exemption; how claimed and what not waiver of.* — A defendant in execution may claim property as exempt at any time before sale, and does not waive or lose this privilege by giving a bond for the forthcoming of the property, after the levy on it.

APPEAL from Circuit Court of Cherokee.

Tried before Hon. W. L. WHITLOCK.

This was a summary proceeding commenced by the appellee, Hamilton, by motion in the circuit court, against Daniels, the sheriff, and his sureties, for his failure, from want of due diligence, to make the money on a certain execution placed in his hands against William Johns and George Agnew.

The motion was directed to the sheriff, by name, "and his sureties," without anywhere stating their names. It states that there was indorsed by the clerk on the *fi. fa.*, "No security of any kind can be taken on this execution," and that with proper diligence the money could have been made out of the property of the defendants.

The sheriff alone appeared. He demurred to the motion: 1. Because it was not alleged that there was any judgment authorizing the execution. 2. Because there was no judgment or forfeited bond authorizing the issuance of execution against said Johns and Agnew. 3. Because the bond on which the execution issued is void. The court overruled the demurrer,

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whereupon the sheriff pleaded, that "the execution upon which the rule is based was improperly and illegally issued, because the bond upon which it purports to be issued was not in fact and in law forfeited," with leave to give in evidence any matter which might be specially pleaded in bar.

It appears from the evidence that an execution, issued from the circuit court, in favor of the plaintiff in the motion and against William Johns, was placed in the hands of the sheriff. Afterwards he made a return that he had levied the *fi. fa.* on certain personal property of the defendant. About a month thereafter he returned a replevy bond, executed by said Johns and one George Agnew, for the forthcoming of the property, with this indorsement: "This bond I return forfeited." Some time after this, the sheriff amended his return on the execution and the forthcoming bond by leave of court, so as to show that the property levied on was claimed as exempt by the defendant in execution, and upon his written affidavit of exemption, presented before sale, the property was returned to him, and that the delivery bond was returned without a sale, and that the defendant had no other property in the county.

The plaintiff read in evidence the *fi. fa.* and the forthcoming bond, with the original returns of the sheriff thereon, in connection with proof that at the time the execution was put in the sheriff's hands the money could have been easily made out of the property of Agnew. The defendant then introduced the amended returns, and offered testimony going to show that shortly before the execution was placed in his hands, the defendant Johns was a resident citizen of the State and county, and had been for some time previous. The presentation of the affidavit of exemption by the defendant on the day of sale, before sale hours, and the delivery of the property to him, were proved. There seems to have been no question to the right of the defendant to the exemption, except upon the ground that he was not a resident. There was no appearance for, or proof of suretyship of, certain parties, mentioned in the margin of the judgment entry as sureties of the sheriff, and against whom, as well as the sheriff, judgment was rendered, on verdict of the jury, for the amount of the execution, eight per cent. interest, and twenty per cent. damages, the amount claimed in the motion. The bill of exceptions purports to set out all the evidence.

There were various exceptions reserved to the ruling of the court below upon the admission of evidence and to charges given and refused, two only of which need be noticed.

The court charged the jury "that the amended returns made in the *fi. fa.* and bond did not render the execution issued on the forfeited bond void or illegal; that the amended, re-

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turns related back to the original returns, but were not substituted for them, and did not overrule the return of forfeiture made by the sheriff." To the giving of this charge the defendant duly excepted. He also excepted to the refusal of the court to give the following written charge: "6. If the jury are satisfied from the evidence that the defendant in execution, Johns, was, prior to the time of filing his claim to the property levied on under the *fi. fa.* offered in evidence, a resident of the State of Alabama, the presumption of law is that he continued to be a resident of Alabama until the contrary is satisfactorily shown by proof."

The ruling upon demurrer, the charge given and the refusal to charge as requested, and the judgment rendered, are now assigned as error.

M. J. TURNLEY for appellant. — The demurrers should have been sustained, for the amended return showed that the bond on which the execution issued had not been forfeited. The charge given was erroneous. The amended return relates back to the original, and is in all respects substituted for it. 10 Ala. 672; 16 Ala. 605; 4 Ala. 534. The exemption could be claimed at any time before sale, and the release of the property was therefore lawful. *Ross v. Hanna*, 18 Ala. 125; *Jourdan v. Autry*, 10 Ala. 276. This last authority shows that giving bond was not a waiver of exemption. The sixth charge should have been given; it is certainly not abstract. There is no authority for twenty per cent. damages.

J. B. WALDEN & COOPER, *contra*. Appellee's brief did not come into reporter's hands.

JUDGE, J. — It is not necessary, in a proceeding like the present, to particularize by name in the *notice* the securities of the sheriff. But in the *motion* submitted to the court, the names of all the parties against whom judgment is sought should be stated. *McRae v. Colclough*, 2 Ala. 74. There was an omission to do this in the present case, and if, in the demurrer to the motion, the defect of this omission had been specified, the demurrer would have been well taken. The court was prohibited by statute from the consideration of any objection not specifically named, and therefore committed no error in overruling the demurrer.

It appears from the record that the sheriff alone pleaded to the motion; this made it necessary, before any judgment could be rendered against his sureties, that the fact of their suretyship should be proved. The bill of exceptions purports to set out all the evidence introduced on the trial of the cause, and

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it does not appear that any proof was made of this fact. Judgment was rendered against the sheriff and two other persons, stated in the marginal entry to be sureties of the sheriff; this was error on the part of the court. *McRae v. Colclough, supra*; *Harris et al. v. Bradford*, 4 Ala. 214.

The judgment was erroneous for another reason; it was rendered for the amount of the execution, interest, and *twenty*, instead of *ten* per centum damages thereon, — the latter being the maximum amount of damages incurred by a sheriff for a failure to make the money on an execution, which by due diligence could have been made. Rev. Code, § 3033.

A bond for the forthcoming of property which had been levied on by the sheriff had been returned forfeited; subsequently, by leave of the court, the sheriff amended his return so as to show that the bond had not in fact been forfeited. The defendant asked the court to charge the jury, in effect, that the amended return of the sheriff had relation to the date of the original return, and was in all respects substituted for it. This charge the court erroneously refused to give.

A sheriff is allowed to amend his return that the truth of the case may be shown; and when the amendment is made, it has relation to the state of the original return, and has the same effect as if it had been the return originally made. *Smith v. Leavitts*, 10 Ala. 92; *Hodges v. Laird*, Ib. 678; *Leavitt v. Smith*, 14 Ala. 279; *Niolin v. Hamner*, 22 Ala. 578. If the amended return is false, the sheriff is liable to the party injured in damages for the false return.

Property exempt by law from levy and sale under legal process may be claimed after it has been levied upon, and a forthcoming bond executed for its delivery. The defendant in execution may assert his privilege to have it exempted at any time before the sale. *Jourdan v. Autrey*, 10 Ala. 226. The charge requested by the defendant embraced in substance the legal propositions above stated, and should have been given by the court.

It was error also to refuse to give the 6th charge requested by the defendant. When a fact which is in its nature continuous is proved to exist, — and such is the nature of the fact of residence or non-residence, — its continuance may be presumed. 1 Brickell's Dig. 806, § 32.

For the errors we have named, the judgment must be reversed and the cause remanded.

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Cook, Judge, etc. v. Candee.

Appeal from Order awarding Peremptory Mandamus.

1. *Circuit judge; authority to approve sheriff's bond.* — Under the law of force on the 27th day of December, 1871, a circuit judge had no authority to approve the bond of a sheriff elected that year.

2. *Mandamus; when does not lie.* — A probate judge cannot be compelled by *mandamus* to file and record a sheriff's bond, approved by an officer who had no authority to do so.

APPEAL from Circuit Court of Butler.
Tried before Hon. P. O. HARPER.

S. J. CUMMING, for appellant.

ALEX. WHITE, *contra*.

BRICKELL, C. J. — The appellee, at the general election in November, 1871, was elected sheriff of the county of Wilcox. He executed an official bond, the penalty of which was prescribed, and the bond approved on the 27th of December of the same year by the judge of the eleventh judicial circuit. He presented this bond to the appellant, the judge of probate of the county of Wilcox, and demanded that it should be filed and recorded in his office, which was refused. On an application to the judge of the circuit court for the eleventh circuit, a peremptory *mandamus* was awarded, commanding the appellant to file and record said bond. From that judgment this appeal was prosecuted.

The Code provides that a sheriff, before entering on the duties of his office, must give bond, with security, "in an amount to be fixed by the judge of probate of his county, not less than five thousand dollars, payable and conditioned as provided in section 157 (118), which bond must be approved by the judge of probate and recorded and filed in his office." If there is no judge of probate, the clerk of the circuit court is required to fix the amount, and approve the bond, and record and keep the same in his office, until the office of probate judge is filled, when it must be delivered to the judge and kept and recorded in his office. R. C. §§ 814-15. On the judge of probate, or, in the event of a vacancy in that office, on the clerk of the circuit court, was devolved the exclusive power prescribing the penalty, and approving a sheriff's bond. The power is special and statutory. *Harris v. Bradford*, 4 Ala. 214. It can be exercised only by the officers specially designated in the statute. A judge of the circuit court is intrusted with the power of approving some official bonds, — as the bond of a probate judge;

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but the bond of a sheriff is not one of these. Therefore, the appellee had no right to demand of appellant the filing and record of an official bond, approved by a judge of the circuit court. Such a bond it was not the duty of appellant, nor had he any legal authority, to file and record. Its filing and record would have been of no more force and effect than the filing and record of the appellee's commission as sheriff, or of any other document or paper the law did not require to be filed and recorded.

The act of August 1, 1868, authorized a judge of the supreme court, a chancellor, or a judge of the circuit court, to prescribe the penalty, and approve a sheriff's official bond. Pamph. Acts 1868, p. 7, § 3. But this act by its terms was confined and referred only to sheriffs "elected at the election held on the 4th, 5th, 6th, 7th, and 8th days of February, 1868." It did not operate, except as to sheriffs then elected, to repeal the sections of the Code to which we have referred, or to confer on the other judicial officers mentioned power concurrent with the power which was exclusive in the probate judge, or in the event there was no probate judge, in the circuit clerk. After the election in February, 1868, and until the admission of Alabama to representation in the Congress of the United States, and the recognition and approval of the Constitution of 1867, the officers elected could make no claim to their respective offices, — could execute no official bonds, — and there was no power to recognize them or their authority. A special statute, prescribing the mode by which they could be inducted into office, was a necessity after the act of Congress. To meet this necessity was the purpose of the act of 1868. When the necessity was met, the statute performed its office, and ceased to exist.

The 55th section of the act of April 22, 1873, extends, as to officers thereafter elected or appointed, to judges of the supreme court, chancellors, or judges of the circuit court, the power of approving the official bond of a sheriff. This statute was passed long after the approval of the bond of the appellee, and after the judgment in this cause. It can have no operation on the case presented by the record.

The appellant correctly refused to file and record the bond presented by the appellee. He had no authority so to do, and the court should not have awarded a *mandamus* commanding him to file and record the bond. A *mandamus* is never awarded to compel an officer to do that which it is not lawful for him to do, without such mandate. *State v. Judge*, 15 Ala. 740.

The judgment is reversed, and a judgment here rendered dismissing the application of the appellee, and he must pay the costs in this court and the court below.

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[Rolater v. Rolater.]

Rolater v. Rolater et al.

Bill of Exceptions.

1. *Bill of exceptions; what indispensable to.* — The signature of the presiding judge is indispensable to the validity of a bill of exceptions, and alone authorizes its incorporation in the record.

2. *Unsigned bill of exceptions, disregarded.* — The appellate court, *ex mero motu*, will disregard an unsigned bill of exceptions, although no motion is made to strike it out of the record.

APPEAL from Circuit Court of Cherokee.

Tried before Hon. W. J. HARRALSON.

The point decided sufficiently appears in the opinion.

FOSTER & FORNEY and McSPADDEN, for appellant.

COOPER & WALDEN, *contra*.

BRICKELL, C. J. — Bills of exception, in civil or criminal cases, were unknown to the common law. They derive their existence from statutory provisions. *Ned v. State*, 7 Port. 187; *Bourne v. State*, 8 Port. 458. The appropriate office of a bill of exceptions is to introduce on the record rulings of the court which are not "intrinsic to the cause," but arise incidentally in its progress; as the admission or rejection of evidence, instructions to the jury given or refused. The ruling of the court on all questions relating to the sufficiency of pleading is of necessity a part of the record, as the pleading, with the process and judgment, constitute the record. No exception was or is necessary to their revision. The evidence admitted or rejected, the instructions given or refused, did not constitute a part of the record. As in these errors intervened, or could intervene, as injurious to the parties as any ruling on the pleadings, a bill of exceptions is given by the statutes, as a mode of introducing into the record such rulings, that they may be presented for revision to a court of superior jurisdiction. The statute authorizing a bill of exceptions requires that it shall be signed by the presiding judge; by his signature it becomes a part of the record. R. C. § 2755.

The statute, prior to the Code, required not only the signing a bill of exceptions by the presiding judge, but that he should affix to it his seal. Clay's Dig. 307, § 5. Under this statute it was held by this court, that a bill of exceptions without the seal of the presiding judge did not conform to the requirements of the statute, and could not be regarded as a part of the record. *Floyd v. Fountain*, 17 Ala. 700; *Godden*

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v. Legrand, 28 Ala. 158; *Moore v. Appleton*, 34 Ala. 147. In the case first cited, the court say: "Under this act, we think it manifest that the bill of exceptions itself must show that it was both signed and sealed as such by the presiding judge. These are the requisites prescribed by the statutes, and if we can dispense with one we may well dispense with the other. If we could say that a bill of exceptions was good without a seal when the act requires one, we could also, with the same propriety, say it need not be signed by the judge; and thus by dispensing first with one and then with another requisite, a bill of exceptions might be held good that had neither of the legal requisites of one."

All the errors assigned in this cause refer to a paper purporting to be a bill of exceptions, transcribed into the record, but which does not bear, or purport to bear, the signature of the presiding judge. It is not part of the record, and was transcribed therein without the authority of law. The signature of the presiding judge only could make it part of the record, and give to the clerk authority to certify it to this court. Under the statute such signature is indispensable to its authenticity, and we decline, for reasons so forcibly stated in the case from which we have quoted, to depart from the letter of the statute.

True, no motion has been made to strike this paper from the record, but we feel bound *ex mero motu* to disregard it. The statute has not authorized the court to substitute for the signature of the presiding judge the assent of parties, or their failure to object to a paper which may purport to be a bill of exceptions. A bill of exceptions, as we have said, is statutory, and that which the legislature has prescribed as its necessary constituent, the courts have no power to declare unnecessary.

There is in the record a paper purporting to be an agreement in writing, signed by counsel, authorizing the presiding judge to sign a bill of exceptions in vacation. As the parties may desire to carry this agreement into effect, we will not affirm the judgment but dismiss this appeal.

Appeal dismissed.

Marlowe & Wife v. Benagh.

Bill in Equity to foreclose Mortgage.

1. *Preponderance of testimony; when does not control decree.* — In ascertaining the existence of facts from conflicting evidence, the chancellor is not necessarily governed by the preponderance of the testimony. The material inquiry, for him, is whether the evidence generates in his mind a clear and rational belief of the existence of the fact affirmed, essential to relief sought or the defence interposed.

2. *Same; rule in passing upon finding of lower court in appellate tribunal.* — The

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chancellor's finding upon facts will not be reversed merely because the appellate court cannot see that the decree is right; it must be satisfied that it is wrong. The presumption in favor of the judgment of the court below prevails as well to its findings upon the facts as to its rulings upon the law.

APPEAL from Chancery Court of Tuscaloosa.

Heard before Hon. A. W. DILLARD.

The point decided sufficiently appears from the opinion.

VAN HOOSE, POWELL & WATTS, for appellants.

HARGROVE & LEWIS, *contra*.

BRICKELL, C. J. — The questions presented in this case, as to which we have felt any doubt or embarrassment, involve matter of fact rather than of law. They are of that character in the decision of which absolute certainty is unattainable. The positive evidence is conflicting, but is reconcilable probably, so as to support either party, without an imputation of bad faith to witnesses or parties. The main fact in controversy is whether, by the acceptance by a mortgagee of a second mortgage, a prior mortgage was extinguished. Or, whether a parol agreement that the second mortgage should so operate, made by an agent of the mortgagee, was with authority; or if not with authority, whether it was subsequently ratified by the mortgagee. No legal presumption intervenes to aid in the determination of the facts, nor is there any definite standard as to the quantity of evidence necessary to prove or disprove them.

The second mortgage, in the absence of a release, or of some covenant or agreement that it should operate as a satisfaction of the first, is deemed merely an additional security for the debt. *Gregory v. Thomas*, 20 Wend. 17; *Boyd v. Beck*, 29 Ala. 704. The agreement may rest in parol. 1 Hilliard on Mort. 455-478.

The appellee seeks a foreclosure of the prior mortgage, and its extinguishment is an affirmative fact, set up in bar to the relief. It is matter of defence; the burden of its proof is cast on the appellants, who rely on it. If the evidence as to the fact is equally balanced, the defence is not established. Or, if there is a mere preponderance of evidence tending to support the fact, it cannot be made the basis of a decree or judgment. *Mays v. Williams*, 27 Ala. 267; *Jarrell v. Lillie*, 40 Ala. 271. In *Mays v. Williams* the court say: "We think, also, that the court laid down the law too broadly, when it instructed the jury that in civil causes they were bound to find according to the preponderance of the testimony. Whatever facts are necessary to be established — whether by the plaintiff to give him

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a right to recover, or by the defendant to sustain his defence — must be proved ; and although from the nature of things, it is impossible to say what degree or quantity of evidence amounts to proof, as it must necessarily depend upon the effect it has upon the mind, yet it will scarcely be denied it would be unjust to charge a defendant with a heavy debt, when the preponderance of the evidence merely inclined the mind of the jury to the side of the plaintiff ; or to mulct a man in heavy damages, when the evidence, although it preponderated against him, left the minds of the jury in a state of great doubt and uncertainty whether he was the person who committed the act complained of. We have high authority to sustain us in saying that, in such cases, a mere preponderance of evidence might not be sufficient. 1 Stark. Ev. (4th Am. ed.) 451-2. Much, of course, depends on the nature of the fact to be established, and in most cases the amount of evidence required would vary as the fact was more or less improbable in itself ; but no matter what might be the preponderance of testimony, if it failed to produce a rational belief in the minds of the jury as to the existence of the fact, it could not in any sense be said to be proved." The rule thus announced must be observed by a chancellor in passing upon evidence. The question is not as to the preponderance of evidence, but is the fact affirmed, essential to relief sought or a defence interposed, proved ? Does the evidence generate a clear, rational belief of its existence ? On the chancellor, subject to the revisory jurisdiction of this court, rested the responsibility of a determination of this question. After a consideration of all the evidence, he has affirmed it does not, whatever may be its preponderance, produce that rational conviction of the existence of the disputed fact, which the law denominates proof.

It has become the settled practice of this court not to disturb the decision of a chancellor on a question of fact, unless there is a decided preponderance of evidence against the conclusion he attains. *Phillips v. Phillips*, 39 Ala. 63 ; *Gordon v. Jones*, 42 Ala. 146 ; *Kennedy v. Marrast*, 46 Ala. 161 ; *Bogan v. Daughdrill*, last term. The rule is extended to the judgments of all primary courts on questions of fact. *Dane v. Mayor of Mobile*, 36 Ala. 304 ; *Kirksey v. Kirksey*, 41 Ala. 626. The rule is probably too strongly stated in some of the cases. It is only an expression of the general rule prevailing in appellate courts, that error must be affirmatively shown ; it is not enough that the court cannot see the judgment of the primary court was right ; unless shown to be wrong, the presumption of correctness arises. 1 Brick. Dig. 781, § 120.

The disputed facts in this cause resting largely on the intention of the parties, and the direct, positive evidence being in

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conflict, from witnesses of equal credibility, it is not matter of surprise if different minds should reach different conclusions as to the existence of the facts. The fact of the ratification of the agreement for the extinguishment of the mortgage is peculiarly a question of the intention of the mortgagee. The unauthorized act of one professing to act as agent of another is capable of ratification, and the ratification may be either express or implied. Whether express or implied, it must have been deliberate, with full knowledge of the material facts. *Clealand v. Walker*, 11 Ala. 1058; *Reynolds v. Dothard*, Ib. 531; *Blevins v. Pope*, 7 Ala. 371; *Wood v. McCain*, Ib. 800; *Lazarus v. Shearer*, 2 Ala. 718; *McGowan v. Ganard*, 2 Stew. 479.

We have carefully reviewed the evidence, and we cannot declare that we are fully convinced the chancellor erred in the conclusion he attained. We may not see clearly that his conclusion is right, but we must see clearly that it is wrong, or it is supported by the presumption of correctness the law commands us to indulge. The decree is affirmed.

Luke v. Calhoun County.

Action by Widow to recover Penalty for Murder of Husband, under Act of Dec. 28th, 1868.

1. *Judicial notice taken of photography.* — The courts will judicially notice the art of photography, the mechanical and chemical process employed, the scientific principles on which they are based, and their results.

2. *Personal identity; when photograph admissible evidence to show.* — A photograph, shown by the widow to be a good likeness of her husband, and an indorsement thereon, in his handwriting, of his name, date, and place of its execution, are admissible evidence to show the identity of the husband and a murdered man, when offered in connection with the testimony of the photographer, that it was the likeness of a man of the same name as the husband, taken at the place and about the time indorsed on it, and the further evidence of a witness, who saw deceased shortly before and after death, that it was a good likeness.

3. *Act to suppress murder, lynching, &c., applies to aliens as well as citizens.* — Statutes passed for the security and protection of life, in the absence of clear and unexceptionable language forcing a contrary conclusion, will be held to apply as well to aliens and mere sojourners as to citizens. The fact that the person murdered and the widow, or next of kin, were aliens, is no defence to a recovery under the "Act to suppress murder, lynching, and assaults and batteries," approved Dec. 28th, 1868.

4. *Written evidence; authority of court to charge upon effect of.* — The authority of the court to charge upon the effect of evidence consisting wholly of depositions, is no greater than where the testimony is delivered orally.

5. *Same; charge upon effect of, when erroneous.* — Although the jury believe evidence, which is without conflict and tends strongly to prove the plaintiff's case, they should not be instructed to find for him, if they are authorized to make any deduction or inference which is fatal to his right of recovery.

6. *Repeal of statute on which action was based pending appeal; practice on reversal.* — The court declined to pass upon the effect of a repeal of the statute, on which the action was based, during the pendency of the appeal, and on reversal, remanded the cause.

[Luke v. Calhoun County.]

APPEAL from Circuit Court of Calhoun.

Tried before Hon. W. L. WHITLOCK.

Appellant's husband, William C. Luke, *alias* William McAdams Luke, having been murdered by disguised persons, on the 12th of July, 1870, in Calhoun county, Alabama, she brought this suit against the county, under the provisions of the "Act to suppress murder, lynching, and assaults and batteries," approved Dec. 28th, 1868, to recover \$5,000, the penalty given by the statute against the county.

Appellant never resided in the United States. She and her husband were subjects of Great Britain, and residents of Canada, which country he left to come to this State a few months before his death.

During the progress of the trial, the plaintiff, for the purpose of showing that the murdered man was her husband, offered in evidence a photographic likeness, which she testified was sent to her by her husband from Alabama a short time before his death, and that it was a good likeness of him; that the words, "*Taken Jacksonville, Ala., March 19, 1870,*" which appeared on it, were in his handwriting. It was also shown by the photographer, whose work it was, that it was the likeness of a man bearing the name of Luke, and was taken at Jacksonville, in this State, about the 20th of March, 1870.

It was further shown by one Smith, deputy sheriff of the county, from whose custody the murdered man was taken by the persons in disguise, who saw the body a few hours after the murder, that it was a good likeness of the murdered man, who bore the name of Luke. Other witnesses testified that the murdered man went by the name of William C. Luke. In connection with the foregoing evidence, she offered the photograph and the indorsement thereon as evidence, but, on the objection of the appellee, the court excluded them, and the appellant duly excepted.

The plaintiff also introduced testimony showing her marriage in 1858 with William C. Luke, and that a man known by that name was murdered in Calhoun county, by armed men in disguise, about the 12th day of July, 1870. All the testimony was introduced by plaintiff, and consisted of the depositions of several witnesses, and a written statement of facts, to which it was agreed certain absent witnesses would testify.

The plaintiff requested the following written charges:—

1. "If the jury believe, from the evidence, that William C. Luke was murdered in the county, in the month of July, or assassinated by any outlaw, or by any person or persons in disguise, or by a mob, or for past or present party affiliation or political opinion, and that the plaintiff is the widow of said Luke, she is entitled to recover, and the form of your verdict will be: 'We the

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jury find for the plaintiff, and assess her damages at five thousand dollars.' And if the murder or assassination was done by a person or persons in disguise, this is sufficient; or if it was done for past or present party affiliation, or political opinion, this is sufficient."

3. "The evidence being wholly in writing, the jury are instructed, if they believe the evidence, they must find for the plaintiff."

The court refused to give either of these charges and the appellant duly excepted.

The court, at the request of the defendant, gave the following charges, to which the appellant duly excepted:—

1. "If the jury believe from the evidence that plaintiff and her deceased husband, for whose death plaintiff sues, were both aliens, not citizens of Alabama or of the United States, the plaintiff cannot recover in this action."

2. "That allegiance and protection are reciprocal, and if neither plaintiff nor her deceased husband owed allegiance to the State of Alabama, then she is not within the act of 1868 and is not entitled to recover."

The exclusion of the photograph, the refusal to charge as requested, and the giving of the charges to which exception was reserved, are now assigned as error.

JASPER N. HANEY, for appellant. — 1. Aliens are as much within the protection of the statute as citizens. See § 12 of Bill of Rights. It declares that "every *person*" shall be protected. Our "federal relations" — treaties with other nations — seem to require a construction of the law which will throw its protection around foreigners as well as citizens. 9 Wheat. 489. The act nowhere uses the word "citizen;" it is beneficent in its purposes, and applies by its language to all persons.

2. All the evidence was written and introduced by the plaintiff. The charge requested on the effect of it should have been given. The jury, if they believed the testimony, were bound to find for the plaintiff.

3. No authority bearing upon the admissibility of the photograph has been found by me; but it is submitted that the evidence tended to prove the identity of the murdered man, and it was for the jury to say what the evidence was worth.

4. The first charge requested ought to have been given. It was not abstract, and follows the very words of the statute.

FOSTER & FORNEY, *contra*.

[Appellee's brief did not come into the reporter's hands.]

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BRICKELL, C. J. — The fact essential to the support of the action was the identity of the man murdered and the plaintiff's husband. In the recent trial of Udderzook for the murder of Goss, a photograph of Goss was offered for the purpose of identifying him with the dead body, which had been found bearing marks of violence. It was admitted, and on error the supreme court of Pennsylvania affirmed rightly. *Am. Law Review*, Oct. 1874, p. 18. In the case of *Ruloff v. The People* (45 N. Y. 213), it was material to show intimate relations between the accused and two deceased persons who were drowned about the time of the murder with which the accused was charged. Photographic likenesses of these persons, taken after death, were shown to relatives and acquaintances, who were permitted to give their opinion as to their identity. Though they had been taken under circumstances not favorable to the production of a correct likeness, and were not artistic pictures, the court did not hesitate in declaring the propriety of receiving them as evidence. In each of these cases, a photograph, though it is not the original likeness, and is only a copy taken from a negative, is recognized as evidence of the same character as a portrait or miniature, which, when a question of personal identity is involved, and its resemblance is shown, can be used in evidence. In *Barnes v. Ingalls* (39 Ala. 193), it is held, that persons not experts could testify whether a photograph was a good likeness. The court say: "Evidence on such a question stands upon the same footing as evidence of handwriting, the value of property, the identity of an individual, &c.; and we think that the testimony of witnesses, that pictures which the plaintiff, while in defendant's employment, had 'executed for them,' were good likenesses, was competent evidence in this cause."

The plaintiff prior to, and at her husband's death, resided in Canada. She had never been in Alabama. The residence, or rather sojourn here, of her husband, was but for a few months immediately preceding his death, if he was in fact the murdered man. The photograph offered in evidence had been taken in Alabama, and had been sent to her by her husband, with the indorsement in his handwriting. The artist by whom it was taken proved that it was taken about the time, and at the place stated in the indorsement, and that the person for whom it was taken, and whose likeness it was, bore the surname of plaintiff's husband. A witness present when the disguised men carried off the man subsequently murdered, proves that the photograph is a likeness of the murdered man, who bore the name of William C. Luke, one of the names by which plaintiff's husband was known. We are unable to perceive any substantial reason for the rejection of the photograph

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and indorsement thereon as evidence. They seem to us legitimate to establish the fact material to support the action—the identity of the plaintiff's husband and the man murdered. A court cannot refuse to take judicial cognizance that photography is the art producing *fac-similes*, or representations of objects by the action of light on a prepared surface. *Barnes v. Ingalls, supra*. As such it has been so long recognized, the mechanical and chemical process employed, and the scientific principles on which it is based are so generally known, that it would be vain for a court to decline cognizance of it. If the art was not judicially noticed, the evidence of the resemblance of the photograph to the appellant's husband, and to the murdered man, would require that the photograph should be submitted to the jury, to enable them intelligently to declare whether the weight of evidence established the identity. On a question of personal identity, a large latitude is allowed in the admission of evidence authorizing, in the absence of positive evidence, the introduction of facts, slighter and more insignificant than the resemblance of a photograph to the person whose identification is the matter in issue. Marks upon the person, though similar marks may be easily fabricated; physical peculiarities, though many persons may bear them; articles of dress, or whatever fact has a reasonable tendency to establish the identity, have been received. The photograph and its indorsement should have been allowed to go to the jury, in connection with all the other evidence bearing on the question of identity.

The evidence showed that the appellant and her husband were aliens, subjects of Great Britain, never having been domiciled in Alabama or in the United States. The court, on the request of the appellee, charged the jury, that if they believed, from the evidence, "that plaintiff and her deceased husband, for whose death plaintiff sues, were aliens, not citizens of Alabama or the United States, the plaintiff cannot recover." To the giving of this charge the appellant reserved an exception, and now assigns it as error.

Murder at common law is defined as the unlawful killing of a human being, under the king's peace, with malice aforethought, either express or implied. The statutes of this State, though dividing murder into two degrees, and specifying the particular constituents of murder in the first degree, have wrought no change in the common law definition. Every unlawful and malicious killing is murder under the statutes, as it was murder at common law. If not perpetrated by poisoning, or lying in wait, or in the attempt to commit rape, arson, robbery, or burglary; or if not the offspring of wilfulness, deliberation, malice, and premeditation; or attended by any act

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evincing a depraved mind regardless of human life, the statute, in tenderness to human frailty, reduces the killing to murder in the second degree, and subjects the offender to a milder punishment than that imposed on murder in the first degree. Degrees in murder the common law did not recognize, and visited every felonious killing with the penalty of death. The statute is designed to mitigate the severity of the common law, and adapt the punishment to the enormity of the offence. The only characteristic the party slain is required to possess is, "a human being, under the king's peace." Be he sane or insane, of good or evil report, "man, woman, child, subject born, or alien, persons outlawed, or otherwise attainted of treason, felony, or premunire, Christian, Jew, Heathen, Turk, or other infidel," if, in the language of the old common law indictment, he was "in the peace of God, and our lord the king," unlawfully and maliciously to take his life is murder. 2 Bish. Cr. Law, § 540. Around all these, the protecting arm of the king, or of the State is thrown. Each and all are equally protected in the right to life and its enjoyment. The words of the statute, under which this suit is brought, are as broad and comprehensive as the common law definition of murder. "Any person," is the language of the statute; not broader or more comprehensive would have been the expression, "Any human being." The husband or widow, or next of kin of any person assassinated or murdered, is entitled to maintain the action, and to the recovery. There is not a word or expression in the statute limiting or qualifying these general words. They comprehend every person who can be assassinated or murdered. So comprehending all who may be the subjects of assassination or murder, a judicial construction cannot limit or narrow them, upon a mere conjecture that the general assembly did not intend to extend to an alien the same measure of protection afforded to natives or naturalized citizens, — a conjecture we could never indulge, and a statutory construction we would never adopt, when the security of person and life is involved, unless demanded by clear, unambiguous language. The suppression of murder — secret murder, more odious than any other unlawful and malicious killing, for the very secrecy is indisputable evidence of malice — is the purpose the statute intends to accomplish. It was supposed that the consequences such murders might visit on the county at large would quicken the diligence of public officers and private citizens to detect, pursue, apprehend, and bring offenders to conviction and punishment. Such conviction bars the suit, or, if it has ripened into judgment, operates as a satisfaction thereof. Be the victim an alien or a citizen, the law is violated, the peace is broken, the security of person and life is lessened, to

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the same extent, and as great crime is committed in the killing of the one as the other. The purpose of the statute would not be accomplished if a distinction was drawn between the killing of a citizen and alien; murder would not be suppressed.

It is said by Blackstone, that it was an ancient usage among the Goths in Sweden and Denmark to subject the vill or hundred in which a murder was perpetrated to a heavy amercement, if the murderer was not produced. This custom was introduced into England, according to Bracton, by King Canute, to prevent his countrymen, the Danes, from being privily murdered by the English; and was afterwards continued by William the Conqueror, for the security of his Norman followers. If the person slain was an Englishman, the county was relieved from the amercement. This difference was abolished by a statute of Edward the Third, and thereafter murder was defined, "without regarding whether the party slain was killed openly or secretly, or whether he was of English or foreign extraction." 4 Black. 195. The statute under consideration was doubtless suggested by the later English statutes, in which no difference is observed as to the national character of the murdered victim.

A question not wholly unlike the one we are considering was presented to this court in *Sidgreaves v. Myatt*, 22 Ala. 617. The statute of 1830 rendered all words spoken and published of any female of this State, imputing a want of chastity, actionable in themselves. Clay's Dig. 538, § 1. Under this statute it was held, in the case referred to, that a female residing in this State, whether a citizen or a foreigner, could maintain an action for such words.

It is certainly, as insisted by the counsel for the appellee, a legal and political axiom, that "protection and allegiance are reciprocal." The charge of the circuit court, so far from deriving any support from this maxim, is in direct opposition to its letter and spirit. Aliens resident, or sojourning here, do not owe the full measure of allegiance exacted from the citizen, nor can they enjoy all the rights, privileges, and immunities of citizenship. Yet they owe a qualified, local, temporary allegiance. They are bound to obedience to all general laws for the maintenance of peace and the preservation of order. If guilty of any illegal act, or involved in any dispute with our citizens, or with each other, they are amenable to the ordinary tribunals of the country. In return for the qualified allegiance demanded of them, a corresponding protection to life, liberty, and property is extended to them. 2 Kent, 25. We are constrained to the conclusion, that the charge given by the circuit court cannot be sustained.

The first charge requested by appellant, reciting every fact

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essential to support the action, instructed the jury, if the facts were shown by the evidence, their verdict should be for the plaintiff, and in form, "We the jury find for the plaintiff, and assess her damages at five thousand dollars." In refusing this charge, the circuit court erred. A party is entitled to a charge asserting a correct legal conclusion, applicable to the evidence, in the terms in which he may express it, and its refusal is error. R. C. § 2756. There was certainly evidence tending to establish every fact recited in the charge. The credibility and sufficiency of the evidence was referred to the jury, and the legal conclusion drawn from these facts was clearly correct.

The third charge requested by the appellant was correctly refused. Though all the evidence in the cause consisted of depositions, or of written statements of the testimony of absent witnesses, these depositions and statements were substituted for the witnesses, and rank no higher than oral evidence. The authorities to which counsel refer, asserting that the court may charge directly on the evidence, when it is in writing, without referring its credibility to the jury, are cases in which there was written evidence excluding parol evidence. The case of *Rigby v. Norwood* (84 Ala. 129) is an example. The suit was on a written guaranty, void on its face under the statute of frauds; a charge directly on the evidence, not referring its credibility to the jury, did not invade the province of the jury, and was permissible. The difference between that and the present case is obvious.

Since this appeal was taken, the general assembly have repealed the statute on which the action is founded. The appellee insists that, as the action is for a penalty, the repeal of the statute creating the penalty is destructive of a right further to prosecute the suit, and in the event of a reversal the cause shall not be remanded. Without expressing any opinion as to the right further to prosecute the suit, we believe the correct practice is the remandment of the cause. The jurisdiction of this court is appellate and revisory, and when judgment is pronounced on the errors assigned, as a general rule, the jurisdiction is exhausted. The effect of the repeal of the statute was not a matter which could or did enter into the judgment we are called to revise. If we pass on its effect now, we would exercise a jurisdiction akin to original, if not strictly original.

The judgment is reversed, and the cause remanded.

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Trover for Conversion of Cotton.

Landlord; what has not sufficient interest in, to mortgage. — The landlord has no such interest in, or title to, crops grown on the rented lauds as can be made the subject of a valid mortgage.

APPEAL from Circuit Court of Lowndes.

Tried before Hon. JAMES Q. SMITH.

Facts are stated in the opinion.

R. M. WILLIAMSON, for appellant.

WATTS & TROY, *contra*.

JUDGE, J. — The foundation of the plaintiff's title to the cotton, which is the subject of this suit, was a conveyance by mortgage of the cotton to him by one Sam Bonham. Bonham had raised the cotton on land rented by him from one Baine, and had delivered it to the plaintiff under the mortgage.

The defendant claimed the cotton under a prior mortgage which had been executed to him by Baine, the landlord of Bonham, and had obtained possession of the cotton by threats of violence.

Did Baine have any title to or interest in the cotton of his tenant which could be the subject of a valid mortgage? This question must be answered in the negative. As landlord, he had a lien upon the products of the land for the payment of any rent which might be due him for the current year; and this lien might have been enforced in a proper case, by process of attachment under our statute, but was not the subject of assignment or transfer to another.

Baine could have maintained no action, either of tort or assumpsit, to recover the cotton or its proceeds, based upon any title of his as landlord; though a purchaser from the tenant might be liable in an action on the case, if he purchased the property with notice of the landlord's lien, and with a design to defeat the landlord of his right. *Thompson v. Spenks*, 12 Ala. 155; *Dulany v. Dickenson*, Ib. 601; *Blum v. Jones*, in MS., June term, 1874.

It follows that the defendant acquired no right or title to the cotton by the mortgage from Baine; and as there was no conflict in the evidence, the court should have given the charge requested by the plaintiff, that if the jury believed the evidence, they must find for the plaintiff. For the refusal to give this charge the judgment must be reversed, and the cause remanded.

Fretwell *et al.* v. McLemore *et al.**Bill in Equity for Account and Settlement of Administration, and for Distribution, &c.*

1. *Distribution ; when equity will decree direct without administration.* — Courts of equity will dispense with administration and decree distribution direct, when the only office of administration if granted would be distribution.

2. *Distribution, bill for ; parties to.* — A citizen of Georgia, possessed of assets here, died intestate in that State, several children surviving her there. Subsequently one of the children, a son, died leaving children. No administration was had upon his estate, and there were no debts against it. Administration was had here upon the first intestate's estate, but none in Georgia. There were no debts in either State. By the laws of Georgia an intestate's personalty is distributed to the widow and children in equal parts: *Held*, 1st. The distributees and the children of the deceased distributee might well join as complainants in a bill seeking an account and settlement of the administration here and a distribution. 2d. The bill was not demurrable for want of necessary parties complainant, because the administrator of the deceased distributee and the administrator of the intestate were not made parties.

3. *Ancillary administration ; dignity of ; when will decree distribution.* — Ancillary administration here upon the estate of a citizen of a sister State, dying there intestate, is in no proper sense dependent upon the domiciliary administration. Whether the court here should decree distribution or remit the property abroad is matter not of jurisdiction, but of sound judicial discretion, dependent upon the peculiar circumstances of each case.

4. *Section 2091 R. C., bar of ; how computed.* — The statutory bar in favor of sureties of executors, administrators, and guardians, is to be computed from the judicial ascertainment of the principal's default, and not from the date of the actual misfeasance or malfeasance for which the surety is sought to be charged.

5. *Non-claim, statute of ; operation upon claims of heirs and legatees.* — The claim of heirs or legatees against the estate of a surety, growing out of the misfeasance or malfeasance of his principal, whether judicially ascertained or not, is barred if not presented to the administrator of the surety within eighteen months.

6. *Same ; what claims excepted from.* — The claim of "heirs or legatees claiming as such," excepted from the statute of non-claim, is the claim of title, whether derived from the statutes of descents and distribution or by will, to property of the estate — the right to the specific property in the hands of the administrator, unadministered and unconverted, as contradistinguished from a claim for a *devastavit*, or for a default creating merely the relation of debtor and creditor.

7. *Overruled case.* — The case of *Harrison v. Harrison* (39 Ala. 489) overruled as to points decided in 5th and 6th head-notes.

APPEAL from Chancery Court of Montgomery.

Heard before Hon. ADAM C. FELDER.

The bill in this cause was filed by the appellants against the appellees on the 17th day of February, 1873. Its allegations are that Esther Fretwell, a citizen of the State of Georgia, departed this life intestate in the year 1854, leaving assets in the State of Alabama. No administration of her estate was ever had in Georgia, and no debts existed against her either there or here. In 1854, the court of probate of Montgomery county in this State appointed one Joseph D. Hopper as administrator of the estate of said Esther, who qualified and gave bond, with the defendant McLemore, E. C. Hannon, the intestate of the defendant, Thomas E. Hannon, and others as his sureties. As such administrator said Hopper received assets

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amounting to about fifteen hundred dollars. He died in 1868, not having made a settlement of his administration and distribution of such assets. At his death, he was insolvent, and there has been no administration of his estate. E. C. Hannon, the intestate of the defendant Thomas E., died in 1870, and on the 13th of July of that year, administration of his estate was committed by the court of probate of Montgomery county to said Thomas. The complainants are the children and the grandchildren of said Esther, the grandchildren being children of a son, who has died since said Esther, and of whose estate there has been no administration, and against whom, it is averred, no debts exist. He was at his death a citizen of Georgia. The laws of that State distribute the personal assets of an intestate to the widow and children in equal parts. The prayer of the bill is for an account and settlement of the administration, a distribution of the assets, and that payment of the distributive shares be decreed against the defendants, and for general relief. Answers, incorporating demurrer, were filed. The causes of demurrer may be resolved into these: a misjoinder of complainants, in joining the children of the deceased son of the intestate, whose death was subsequent to hers, with the children of the intestate; the want of necessary parties complainant, — the administrator of said deceased son, and of an administrator *de bonis non* of said Esther; that the bill presents a case *prima facie* within the bar of the statute of limitations, and if any cause exists for exempting it from the statute, such cause is not averred; and that, as to the administrator of Hannon, the statute of non-claim is a bar to the relief sought. Thé demurrer was sustained, and the complainants declining to amend, a decree was rendered dismissing the bill. From that decree this appeal is taken, and the ruling of the court is assigned as error.

R. M. WILLIAMSON and F. C. RANDOLPH, for appellants.

—1. The courts exempt the parties from procuring an administration where it would be a *useless* and *expensive* proceeding. The administration is *necessary* only to protect the rights of creditors; when there are *no debts* against the estate, the court of equity, with ample jurisdiction to separate the interests of all parties in the property, will proceed to exercise that jurisdiction untrammelled by difficulties which would be insuperable in a court of law. 42 Ala. 285; 25 Ala. 285; 5 Ala. 308; *Smith v. Dunn*, 27 Ala. 315; *Marshall v. Crow*, 29 Ala. 278.

2. As to principles governing distribution in a case like the present, see *Harvey v. Richards*, 1 Mason, 413; *Childress v. Bennet*, 10 Ala. 71; *Cochran v. Martin*, 47 Ala. 525.

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3. The statute of this State fixes the period of six years as a bar to any motion or action against the sureties of certain public officers, and of executors, administrators, and guardians, the time to be computed from the act done, or omitted, by their principal, *which fixes the liability of the surety*. Revised Code, §§ 2901-6. Previous to the Code in 1853, no statute of limitations in favor of sureties of an administrator, executor, or guardian, existed. There was, however, a statute in favor of the sureties of a sheriff, constable, and other public officers, fixing six years as the limitation, "next after the *commission of the act complained of*." Clay's Digest, 329, § 90. There is a very marked distinction between the law as found in Clay's Digest and in the Code, as to the period when the statute begins to run. In the statute of 1832, it commences to run from the *commission* of the act complained of; in the Code, it is from the act done, or omitted, which *fixes the liability of the surety*. It must be supposed that in the change of phraseology adopted in 1853, the legislature intended to make such change in the law as the difference of language used would indicate. It is also true that when a statute has been readopted, on which the courts have placed a particular construction, that it shall be still so construed. The language of the present statute, when construed in the light of previous decisions, can admit of no doubt that the liability of the surety is "fixed" only by a judgment or decree of a competent court, and a failure to pay the same. In *Kyle v. Mays* (22 Ala. 692), it is decided to be the duty of an administrator to pay the judgment or decree as soon as it is rendered, and the creditor can sue immediately on the bond, without waiting for an execution and return *nulla bona*. Yet, in the same volume, between the same parties, page 637, the decree was not a final decree, and the court held no suit on the bond could be maintained. *Judge v. Looney*, 2 Stew. & Port. 70; *Gilbrath v. Manning*, 24 Ala. 418; *Jenkins v. Gray*, 16 Ala. 100; *S. C.* 24 Ala. 516. Now, it being held that the liability of a surety is not "*fixed*" until decree or judgment rendered against the administrator, it must be supposed that the legislature had those decisions in mind when the statute was passed. This is the only sensible construction to be given to section 2901 of the Revised Code. The trusts of a guardian and administrator are continuing, and may, as to executors and guardians, and, under our statute, as to administrators, continue for a series of years. Thus, the execution of a will, or administration of an estate ordered to be kept together, may run for ten years; the *actual devastavit* may have been committed within the first year of the trust, undiscoverable to the parties in interest; in such a case, it would be shocking to hold that the sureties are released four years before the time fixed

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for executing the trust. Mr. Justice SAFFOLD, in *Rives v. Flinn* (47 Ala. 481), on this subject uses the following language: "The final settlement was an ascertainment of the extent of the administrator's liability, which *fixes the liability* of the sureties. They were then equally bound with himself to satisfy the decree."

To the same effect are the following authorities: *Ragland v. Calhoun*, 36 Ala. 606; *Yonge v. Ward*, 45 Ala. 474; *Harrison v. Harrison*, 39 Ala. 489; *Alston v. Alston*, 34 Ala. 15; *Rhodes v. Turner*, 21 Ala. 210.

The last three authorities also dispose of the question of staleness of demand. The courts of this State have adopted twenty years as the period of prescription, beyond which the court will presume execution of deeds and grants, settlements made, decrees of courts, or almost anything, to put an end to lawsuits. *Hugh v. Worley*, 40 Ala. 171; *McArthur v. Canie*, 32 Ala. 75; *Wyatt v. Scott*, 33 Ala. 313.

4. But does the statute of non-claim apply to the subject-matter of this suit? The language of the statute is: "That *all claims* against the estate of a deceased person must be presented within eighteen months after the same shall have accrued, or . . . after grant of letters." Without regard to the exceptions contained in the next succeeding section of the Revised Code (§§ 2239, 2240), does the liability of the defendant Hannon fall within the letter or spirit of the words, "*all claims*?" It has been settled, that it is not essential to make it necessary to present a claim that a right to sue thereon should exist. Hence a claim existing, although not due, must be presented. It has also been settled, that there must be a present liability existing to make it necessary that the same should be presented. Thus an obligation in a penalty that two of the obligors shall make a deed in a convenient time after one of them comes of age, is not such a claim until condition broken. The liability on such bond depends upon a future contingency, and does not exist as a *claim* until the contingency happens. *Pinkston v. Huie*, 9 Ala. 252. In *King v. Moseley* (5 Ala. 610), the court decide that a bond to make titles when the purchase-money is paid becomes a *claim* only from the time the purchase-money is paid. So in *Cockrill v. Hobson* (16 Ala. 391), the court held that the liability of an indorser on a bill of exchange did not become a present liability, embraced within the statute of non-claim, until the maturity of the bill, and the failure of the parties primarily liable to pay it. This principle would cover every case of the liability of a guarantor to be fixed by any contingency in the future. This is eminently the undertaking of a surety on an administrator's bond. *Jones v. Lightfoot*, 10 Ala. 17, recognizes this principle. In

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the case of *Pendleton v. Phelps* (4 Day, Conn. 476), it was held that a liability of a partnership after the death of one of the partners, did not become a claim against the estate of the deceased partner until after the insolvency of the surviving partner, which required presentment to the administrator. See also *Gray v. Palmer*, 9 Cal. 616; *Cole v. McMickle*, 30 Ind. 94; *Neil v. Cunningham*, 2 Porter, 171. *Gordon v. Gibbs* (3 Smed. & Mar. p. 489) was a suit upon an administrator's bond against the estate of a surety on the bond for a *devastavit* by the administrator. Neither the bond, nor any statement of the liability, was presented to the administrator of the surety. The statute of non-claim was pleaded as a bar. The statute of Mississippi is substantially the same as ours. How. & Hutch. pp. 413, 414. The court, Judge Sharkey, delivering the opinion of the court, held that the bond of administrators was not within the meaning of the statute. The court further held, as it had before held, that an administrator's bond being recorded in the same court in which the estate of the surety was administered, and being an official document, was "always in a state of presentation." See *Dickson's Adm'r v. Helm*, 2 Smed. & M.; *Harrison v. Harrison*, 39 Ala.

WATTS & TROY and JUDGE & HOLTZCLAW, for appellee. —

1. Heirs, *as such*, cannot recover personal property which belonged to their ancestor, either at law or in equity, except through an administrator. *Bethea v. McCall*, 5 Ala.; *Kelly v. Kelly*, 10 Ala.; *Miller v. Eastman*, 11 Ala.; *Grant v. Gardner*, 19 Ala. The only exception to this rule is where there are no debts and a *sole* distributee. *Vandiver v. Alston*, 16 Ala., and authorities there cited.

2. Mrs. Fretwell's administrator in Georgia is the only party who can sue the administrator here. The administration here is ancillary merely; the primary administration is in Georgia, and the funds must be remitted there for distribution according to the laws of Georgia. 14 Ala. 883; 10 Pick. 77; 9 Mass. 337; 10 Pickering, 97; 14 Peters, 33.

It is clear, therefore, that Mrs. Fretwell's administrator and the administrator of her deceased son are necessary parties. The children of the dead child cannot join with the heirs of the mother. *Hall v. Andrews*, 17 Ala. 40; *Plunket v. Kelly*, 22 Ala. 655.

3. The bill shows that all the assets of Fretwell's estate were collected in money in July, 1854, and that he died in 1868, and this suit is brought five years and more after his death. Hopper could have been compelled to distribute after eighteen months from his qualification, there being no debts. The distributees at that time were of age. No reason is

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shown why they slept so long upon their rights. Failure to distribute for an unreasonable length of time is evidence of a *conversion*, and this conversion fixes the liability of the sureties. *Stoneum v. Governor*, 11 Ala. 679; *Kimbro v. Walker*, 21 Ala. 376.

4. The statute of limitations certainly ran against all the *children* of Mrs. Fretwell. They were all alive at the time Hopper made his inventory and long afterwards. They were then of age. When the statute once commences to run, it is not suspended by intervening disabilities or exceptions. The fact that Charles W. Fretwell died in 1864, that no administration was had on his estate, and that he has one *minor* child, cannot prevent the statute from running. It is certain that the *children* of Esther are all barred. And even if the fact of the death of Charles W., and that there was no administration on his estate; that he left no debts, and has one minor child, could give that minor child the right to maintain this suit, the others being all barred, the minor is likewise barred for joining with those who are barred. All the complainants must be entitled to relief, or none can be. In such case there is a misjoinder of parties complainant, which necessarily dismisses the bill, if not amended. See *Hardeman v. Sims*, 3 Ala. 747; *Wilkins v. Judge*, 14 Ala. 135; Brickell's Dig. p. 750, § 1634.

5. As to Hannon's administrator, there is an additional ground of demurrer. The claim of complainants was never presented to him. It is barred as to him by this non-claim. If there was anything in the facts which could show that the statute of non-claim did not present a bar, it was incumbent on the complainants to show this in their bill. See *Sims v. Canfield*, 2 Ala. 555; *Nimmo v. Stewart*, 21 Ala. 692; *Johnson v. Johnson*, 5 Ala. 90; *Byrd v. McDaniel*, 33 Ala. 18; Story's Eq. Pleadings (3d. ed.), §§ 484, 485, 503, and note to 503; Rev. Code, §§ 2239, 2240.

But it may be said that the exception in favor of minors in section 2240 will apply here.

It is not shown that there is any minor child of Esther Fretwell to whom it could apply. If it could be applied to the minor child of Charles W. Fretwell, it could not apply to any other complainant. As to the other complainants, the *non-claim* is a bar. And they being barred, the minor is barred by misjoinder with the other complainants.

It may be said that this is a suit by *heirs, legatees (distributees) as such*, and that *non-claim* is not a bar in such case under section 2240. The case of *Harrison v. Harrison* (39 Ala.) is cited by the counsel for appellant. The decision cannot be supported on any principle of sound logic. If the

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reasoning of that case is sound, the distributees of an estate may divide the estate amongst themselves, distribute the choses in action belonging to said estate amongst themselves, and each distributee, then, under our present statute, could sue the maker, or rather the administrator of the maker, of some note thus distributed. See *Carter v. Owens*, 41 Ala. 217.

If the administrator pleaded the statute of non-claim, the distributee might successfully reply, "He is suing as an *heir*, *legatee*, or *distributee*," and this replication would be held good, if the reasoning in *Harrison v. Harrison* be sound. If administration had been granted on the estate owning the note, and the administrator had sued on the note against the administrator of the maker, it is clear that the statute of non-claim would be a bar, if more than eighteen months had elapsed. In such case, where the distributee sues on the note, as in *Carter v. Owens*, *supra*, he is substituted in place of the administrator, and he no more sues as an *heir*, *legatee*, or *distributee* than the administrator sues as an heir, &c.

Here Hannon, as administrator of a surety on Hopper's bond, is sued to make him liable for an alleged default of Hopper, the administrator of Fretwell. The statute of non-claim is certainly good as to the children of Charles W. Fretwell, for they are not suing as heirs, legatees, or distributees of Esther Fretwell. The statute of non-claim being a bar as to them, they have no right against Hannon's estate; and having joined as complainants with the distributees of Esther, defeats the whole suit, for the misjoinder of complainants.

But the reasoning in *Harrison v. Harrison* is unsatisfactory, as applied to the facts of that case. It is said the claim of the distributee is not *against* the estate, but is *in* the estate. But, the statute declaring the bar *uses* the words, "claims *against* the estate." The plain, common sense meaning of the statute is, that such claims, whether *against* or *in* the estate, must be presented within the time prescribed. A creditor of the estate, who has a better right *in* the estate or *against* the estate than the heir or distributee, must present his claim within eighteen months. The distributee has no claim, either *in* or *against* the estate, until all debts are paid. The creditor has, therefore, a better right *in* the estate than the heir. How can it be reasonably said, therefore, that the creditor's claim is *against* the estate, and that of the distributee is *in* the estate? The obvious meaning of section 2240 of the Revised Code is, that, so far as heirs or distributees are concerned, they are not barred, *as against the administrator of their ancestor*, if their claim as heirs or distributees is not presented within eighteen months after grant of administration. This section

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of the Code has no application to claims which distributees of *one* estate may have against the administrator of *another* estate.

The claim of the complainants is not *in* the estate of Hannon, but is *in* the estate of their mother, Mrs. Fretwell.

BRICKELL, C. J. (after stating facts as above). — We propose to consider the causes of demurrer in the order in which we have stated them.

In *Gardner v. Gantt* (19 Ala. 668), DARGAN, C. J., said: "The distributees or next of kin can maintain no suit, either at law or in equity, for the mere purpose of distribution, until letters of administration have been duly granted upon the estate of the deceased. This principle is well settled by authority, but even without decided cases no other rule could obtain, for the reason that the law casts the title to all the personal estate of the decedent upon his personal representative. It is true that he holds the title as trustee, to pay the debts in the first instance, and then to make distribution, according to the statute, amongst those entitled. But until letters of administration have been granted, the legal title cannot be brought before the court, and therefore it cannot be bound by the decree; nor can the court see that the trusts have been executed." The case before the court was a bill in equity by the remainder-men of personal property, bequeathed by will, after the death of the tenant for life, for the recovery and distribution of the property bequeathed, which was in the possession of vendees of the life tenant, and averred payment of all the debts of the testator, but failed to show that there had ever been any administration of his estate. The bill was dismissed. There is a series of decisions in this court, asserting that when an estate is left entirely free from debt, the distributees may in equity obtain distribution without the delay and expense of administration. The first of these is *Bethea v. McCall* (5 Ala. 308), which was a bill for an account and settlement of a trust estate. Two of the donees died in infancy, and the survivors, who were the complainants in the bill, were their next of kin. It was objected that the personal representatives of the deceased donees were necessary parties. The court said, in answer to the objection, "There was no necessity to take letters of administration upon the estates of the two brothers who died during infancy. The survivors were the heirs at law, and as they had no capacity to contract debts, cannot be presumed to have any creditors." In *Miller v. Eatman* (11 Ala. 614), which was an action at law, and was held not maintainable, because the personal representative of a deceased infant was not joined as

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a plaintiff, it is said: "In courts of equity, where it is not necessary that the legal title should be vested in the plaintiff, an administration may be dispensed with, when the right is asserted by those who would be entitled to distribution, and when it is clear there are no creditors to be prejudiced. Such was the case of *Bethea v. McCall*, 5 Ala. 315. But even these are exceptions to the general rule, which is the same in equity as at law." In *Vandever v. Alston* (16 Ala. 494), the husband of a sole distributee, without administration, took possession of the personal property of an intestate, paid the debts, and remained in possession, until the death of the wife, when her next of kin had administration granted of the estate of the intestate, and sought to recover of him the property of the intestate. A court of equity intervened for his protection, and in pronouncing the opinion of the court, CHILTON, J., said: "In case of a sole distributee, the claims of creditors aside, I see no principle of public policy requiring the party to push the property through the diminishing process of administration." In *Frowner v. Johnson* (20 Ala. 482) the subject was again before the court, and GOLDTHWAITE, J., in delivering the opinion of the court, used this language: "We do not say that there may not be cases where it is allowable for the distributee of a deceased distributee to take without the intervention of an administration, but those cases are properly regarded as exceptions to the general rule, and to sustain them it is necessary to show affirmatively that an administration would have been a useless ceremony." *Plunkett v. Kelly* (22 Ala. 655) presented, as did *Frowner v. Johnson*, the question here involved. It was a bill filed for the settlement of an estate by several complainants, claiming to be next of kin of the decedent, one of whom deduced his right through his parent, who died after the decedent. The bill contained no allegation showing that administration of the father's estate "would have been a useless ceremony," and was deemed fatally defective on general demurrer. In *Vanzant v. Morris* (25 Ala. 285) the surviving brothers and sisters of a deceased infant were permitted in equity to recover a legacy bequeathed to them jointly with him, without administration on his estate, when there were no debts against it. In *Marshall v. Crow* (29 Ala. 298), which was a bill for partition of personal property between tenants in common, one of whom had died, and of whose estate there had been no administration, the court said: "When an estate is left entirely free from debt, and the distributees do not invoke the action of the probate court to separate their several interests, but ask the chancellor to give them their several shares without an administration, the bill will be sustained, and the relief granted." The surviving tenants were the next of

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kin of the deceased tenant. The rule to be extracted from these decisions is, that a court of equity will dispense with an administration, and decree distribution directly, when it affirmatively appears, that, if there was an administrator, the only duty devolving on him would be distribution. Then administration is regarded as "a useless ceremony." An administrator or an executor is a trustee clothed with the legal title. He holds in trust for creditors and distributees or legatees. The creditors are entitled to charge the assets with the payment of their debts, in priority of the equity of distributees or legatees. When there are no debts, the equity of the distributees or legatees is perfect; the legal title, if there was a personal representative, would be a naked trust, which a court of equity ought not and would not permit to be interposed as a bar to the equitable title of the distributee or legatee. *Vandever v. Alston, supra*; *McCaa v. Wolf*, 42 Ala. 389. There may be expressions in *Vandever v. Alston* indicating that an administration will be dispensed with only when there is a sole distributee. We do not suppose the court intended to be so understood. The expressions were used in reference to that particular case, in which there was a sole distributee, whose husband was claiming to have reduced the personal estate to possession during her life, and that thereby his marital rights had attached. *Plunkett v. Kelly, supra*, certainly announced the true rule, and is not at all inconsistent with our conclusions. It did not affirmatively appear that there were not debts against the deceased distributee. For aught that appeared from the bill, the distributees were seeking, through the instrumentality of a court of equity, to obtain property which ought to have been charged with the debts of the intestate. There was not under the allegations of this bill a misjoinder of complainants. The children of Esther, and her grandchildren, the children of her son, dying after her death, could join. They had a community of interest, and were entitled to relief of the same character.

As we have stated, the intestate, of whose estate distribution is sought, was at her death a resident citizen of Georgia. The want of proper parties complainant, which is made a cause of demurrer, rests on the proposition, that an administration in this State is ancillary. The duty of the administrator is confined to the collection of the assets here, the payment of domestic debts, if any, and the expenses of administration, and the transmission of the *residuum* to an administrator appointed in the domicil of the intestate. For such *residuum*, the administrator here is liable not to the distributees, but to an administrator appointed in the domicil only. It appears from the allegations of the bill, that there has been and is no administration of the estate of the intestate in the State of

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Georgia; that there are no debts existing against her; that the complainants are her only distributees, and reside in Georgia. An administration granted in another forum than that of the domicile of the intestate is treated as ancillary merely. This term serves only to distinguish the one administration from the other. It does not indicate a dependence of the foreign administration on that of the domicile. Judge STORY, in *Harvey v. Richards* (1 Mason, 381), in discussing the proposition involved in the demurrer, said: "One objection urged against the exercise of the authority of the court is, that as national comity requires the distribution of the property according to the law of the domicile, the same comity requires that the distribution should be made in the same place. This consequence, however, is not admitted; and it has no necessary connection with the preceding proposition." Again, he says: "The administrator here is not a mere agent of the administrator abroad. He collects and receives the assets in his capacity of administrator generally; and so far as it may be wanted for the payment of debts and legacies, he holds it in trust for the creditors and legatees, and as to the *residuum*, in trust for the next of kin; and even if he were a mere agent of a trustee, the *cestuis que trust* would be entitled to claim the fund directly from him, for a court of equity may follow a trust fund in whosoever hands it may come." He concludes, that whether the court here ought to decree distribution, or remit the property abroad, is a matter, not of jurisdiction, but of judicial discretion, depending upon the particular circumstances of each case. That there ought to be no universal rule on the subject, but that every nation is bound to lend the aid of its own tribunals for the purpose of enforcing the rights of all persons having title to the fund, when such interference will not be productive of injustice or inconvenience, or conflicting equities. Adopting this view secures justice to all parties having rights or interest in the administration. If there are debts abroad, in equity chargeable on the assets, according to the law of the domicile, the court here would not decree distribution. It would direct their transmission to the domiciliary administrator, to be administered by him under the law, and subject to the responsibilities attaching to him in the forum of his appointment. *Childress v. Bennett*, 10 Ala. 751. If there are not outstanding debts, the administrator here is a trustee for the next of kin, and it would be vain and useless to subject the assets to the diminishing process of another administration, creating only the trust already existing, and capable of enforcement. The domiciliary administrator would have no duty to perform except that of distribution. It cannot be material who is the trustee making the distribution, and we

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can perceive no reason for requiring the interposition of a foreign administrator to do that which the domestic administrator is as capable of doing. The foreign distributees subject themselves voluntarily to the jurisdiction of our courts, ask only relief the court is fully competent to grant, and which in effect the court would grant, if the domiciliary administrator was seeking it. When no beneficial purpose is to be accomplished by the presence of a personal representative, as we have seen, a court of equity will directly decree distribution. It will not take the assets from one, for the mere purpose of making them pass through the hands of another to the proper recipients. The reason and rule apply to the case before us. *Carmichael v. Ray*, 5 Iredell Eq. 365. The statutes of this State are in recognition and affirmation of the rule as stated by Judge Story. R. C. § 2163-4.

The next cause of demurrer is, that the case presented by the bill is *prima facie* within the statute of limitations, and if there be any cause for excepting it out of the statute, the cause should have been averred. The statute invoked is the sixth division of § 2901 of the Revised Code (the section declaring that actions which must be brought within six years), and reads as follows: "Motions and other actions against the sureties of any sheriff, coroner, constable, or any public officer, or actions against the sureties of executors, administrators, or guardians, for any misfeasance or malfeasance whatever of their principal; the time to be computed from the act done, or omitted by their principal, which fixes the liability of the surety." So far as this statute relates to the sureties of public officers, it is a reenactment of the statute of 1832. Clay's Dig. 329, § 90. This statute was construed in *Governor v. Stonum* (11 Ala. 679), and *Governor, use, &c. v. Gordon*, 15 Ala. 72. The first was an action against the surety of a sheriff, for moneys collected under execution by the principal. The statute was declared to commence running in favor of the surety, from the time the execution was returned satisfied. The other case was an action against the surety of a notary public, to charge him for the failure of the principal to give an indorser of a promissory note the notice requisite to charge him. It was held, the statute commenced running from the day of the notary's default, and not from the time of its discovery, or the ascertainment of the damage by the injured party. There is not great difficulty in fixing the period from which the statutory bar shall be computed as to the sureties of a public officer. Each of his actions or omissions generally fixes not only his own liability, but that of his surety, and each furnishes a separate and independent cause of action, in favor of different parties. There is greater difficulty in fixing the time

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from which to compute the statutory bar, as to the sureties of an administrator, executor, or guardian. The administration or guardianship is treated as an entirety, having its inception in the grant of letters, and continuing until a final settlement, or until a termination of the authority the letters confer. The administration necessarily comprises many separate acts and transactions, all of which impose liability, or all of which rather fall necessarily within the liability the bond creates. The condition of the bond is general, for the performance of all such duties as are or may be imposed by law. This condition, according to its literal import, is broken, whenever the principal neglects or violates any duty the law imposes. For such neglect or violation the surety is chargeable by virtue of the condition of the bond. They often furnish cause for removal of the principal and the revocation of his authority. R. C. § 2017-18. Of themselves they do not create a cause of action against, or fix the liability of the surety. Before any cause of action arises against the surety at law, and before the liability is fixed at law or in equity, there must be a judicial ascertainment of the default of the principal. 2 Stew. & Port. 70; Ib. 263, 384; 2 Port. 236, 538; 6 Port. 393; 22 Ala. 693; 24 Ala. 418. From the period the default is thus ascertained, the statutory bar in favor of the surety must be computed. The judicial ascertainment is conclusive on the surety, in the absence of fraud or collusion, when made on the final settlement of the administration in the court of probate. *Ragland v. Calhoun*, 36 Ala. 612. If it is a judgment at law in favor of a creditor, it is conclusive, except as to the existence of assets, or an actual *devastavit*. *Dean v. Portis*, 11 Ala. 104; *Reid v. Nash*, 23 Ala. 733. The judicial ascertainment creates the cause of action against the surety, authorizing the enforcement of the liability imposed by the bond. The theory on which statutes of limitations rest is, that the party to be affected by them has a right to prosecute his cause of action, from the day on which the bar commences. This right cannot be ascribed as to the surety of an executor or administrator, until the liability of the principal is ascertained. If the bar of the statute, as to such surety, should be regarded as commencing from any day prior to this ascertainment, it must be from each default of the principal. Each default must then be considered as fixing the liability of the surety, and as giving a cause of action against him. From liability for a *devastavit* committed to-day, the statute would commence to run. From liability for a *devastavit* committed twelve months hence, the bar would commence to run from its commission. Each *devastavit* would create a cause of action, and the period for the commencement of the bar would be as

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various as the times of their commission. We cannot adopt this construction of the statute. It would render it almost impracticable of application, and work serious injustice to those having a right to rely on the bond, as a continuing security for the liability of the principal, unaffected by the operation of the statutes of limitation, until they have a right to sue on it. When the statute was enacted, the decisions of this court had established beyond controversy, that a judicial ascertainment of the liability of the principal was indispensable to fix the liability of the surety. It was in view of these decisions the statute was passed; and when it speaks of the act done, which fixes the liability of the surety, we think it must be referred to this judicial ascertainment of the liability of the principal. The liability has its origin in the bond, and it is created, whenever the condition of the bond is broken, by a failure of the principal to perform the duties required by law. The views we have expressed accord with the decisions of this court in *Ward v. Yonge*, 45 Ala. 474; *Rives v. Flinn*, 47 Ala. 481. The bill negatives the fact that there had been a judicial ascertainment of the liability of the principal, and of consequence was not subject to demurrer as averring a cause of action within the bar of the statute of limitations.

The remaining cause of demurrer is that assigned by the administrator of Hannon alone, — that it is shown by the bill that more than eighteen months had elapsed from the grant of administration to him, and a presentment of the claim or demand was not averred. The failure to present a claim or demand, within the period prescribed by the statute of non-claim, as a bar, like the statute of limitations, must in a court of law be specially pleaded, or it is not available as a defence. *Mardis v. Smith*, 2 Ala. 382. The rule is different in a court of equity; the defence may then be made by plea, answer, or demurrer, and when it is interposed in the one mode or the other, if there are any special circumstances, or any reason for excepting the case out of the statute, it must be introduced by an amendment to the bill. *Maury v. Mason*, 8 Port. 211; *Nimmo v. Stewart*, 21 Ala. 692; *Morton v. Ragland*, 41 Ala. 344. No cause for excepting the case made by the bill out of the statute is averred, and the only question arising on the demurrer is, whether the cause of action preferred is a claim which should have been presented to the administrator. The claim existed, and was as fully and completely the subject of suit against the intestate, at and prior to his death, as when this suit was commenced. The liability was not fixed so as to authorize a suit against the surety, nor was it fixed so as to authorize a suit against the personal representative. The liability originating on the bond had accrued, and the period prescribed by the

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statutes, as that within which the distributees could claim distribution, having arrived, a court of equity, in the exercise of its original and inherent jurisdiction over trusts, would have called the principal to account and distribution; and to avoid a multiplicity of suits, would have entertained a suit against principal and sureties jointly. There was, therefore, a claim against the intestate at his death, and the claim is now the subject of this suit.

The statutes in reference to the probate of wills, the grant of letters testamentary and of administration, the collection, preservation, and distribution of the assets, the payment of debts and legacies, the enforcement of the liability of executors and administrators to creditors, heirs, and legatees, and to their successors in the administration, were intended as the introduction and establishment of a new system, which of necessity supersedes to a great extent the rules and principles of the common law. All these statutes are in *pari materia*, and when a judicial construction is placed on any one of them, it would not only be unsafe, but would mar and disturb the harmony of the system, if its connection with and relation to other parts was not observed and kept in view.

One of the most manifest purposes this system was intended to accomplish is the speedy settlement of the claims of creditors, and the consequent distribution of the *residuum* to the heirs or next of kin, appointed by law to succeed to it; or to the legatees or devisees to whom the testator has devised or bequeathed it. That these, the manifest and controlling purposes of all the statutes, and of the system they ordain, may be accomplished, the court of probate is established with large powers, capable of more speedy exercise than the powers of other judicial tribunals; and the remedies to be pursued are simpler and less dilatory than those common to other courts. A preference to the right of administration is declared, but those on whom it is conferred must elect to accept and assume it, within the brief period of forty days after the death of the intestate is known, or it is relinquished, and the power of the court to grant it to a person of its own selection becomes ample and indisputable. If no person applies for the administration within sixty days after the death, the general administrator of the county, if there be one, and if none, the sheriff or coroner, is compellable to accept it, and the administration attaches to the office of sheriff or coroner, and his official oath and bond is a security for the faithful administration. Chap. 3, tit. 4, part 2, R. C. Within a very limited period, the estate of every deceased person, under the operation of these provisions, must pass into the custody of the law, and the officers charged with its care and preservation are required to give bonds, with approved

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sureties, for the protection of all having interests in the estate. Should the necessities of the case require it, the court of probate can immediately, on the death of any person within its jurisdiction, appoint a special administrator to collect and preserve the assets, until a general administration can be had. R. C. §§ 1994-97. This special administrator cannot pay the debts, and is not subject to suit as the representative of the deceased. He is the administrator *ad colligendum* of the common law, and his only duty is the collection and preservation of the assets. *Erwin v. Br. Bank Mobile*, 13 Ala. 307. Against the general administrator no suit can be commenced until the expiration of six months after the grant of administration, or of letters testamentary, and no judgment rendered until the expiration of eighteen months after the grant. R. C. §§ 2276, 2649, 3264. Unless an executor or administrator voluntarily reports to the court of probate the solvency of the estate he represents, no proceeding can be instituted to compel him to pay legacies, or make distribution, until the lapse of eighteen months from the grant of letters testamentary or of administration. R. C. chap. 6, tit. 4, part 2. "All claims against the estate of a deceased person must be presented within eighteen months after the same have accrued, or within eighteen months after the grant of letters testamentary, or of administration; and if not presented within that time are forever barred." R. C. § 2239.

There can be but one purpose in these statutory provisions, and that purpose is the speedy administration of estates; first, for the benefit of creditors, who have the priority of right, and when their claims are satisfied, the payment of legacies, or distribution to the heir or next of kin. When the heir or legatee succeeds to the estate, that it shall be to a title freed from the incumbrance of, or liability to debts. In subservience to this purpose has been the uniform construction of these statutes, and specially of that last referred to, known as the statute of non-claim, which is now the subject of consideration. In the absence of this statute, a settlement of an administration, and the payment of legacies and the making of distribution, would be attended with the peril of future litigation by creditors against the legatees or distributees, to subject their legacies or distributive shares to the payment of debts. In making distribution, or paying legacies, the personal representative would act at his own hazard. For, as is stated by Williams, the "authorities seem to demonstrate that the mere circumstance of want of notice of a debt or claim against the estate of the deceased will not excuse an executor or administrator from the payment or satisfaction of it, if the assets were originally sufficient for the purpose, notwithstanding that, in ignorance of the

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existence of the debt or claim, he has *bond fide* handed over the assets to the legatees or parties entitled to share in distribution." 2 Williams on Ex'rs, 1216. In view of these perils, and the litigation and delays incidental to administrations at common law, the statute was enacted. The construction it has received has been that which was necessary to avoid the evils to which we have adverted as incidental to an administration governed by common law principles. It has been deemed to operate a complete bar to all demands, which could be charged on the assets subject to administration; a bar on which the personal representative could rely with safety, and proceed to pay legacies or make distribution; a bar which a creditor could invoke, to protect the assets subject to the payment of his debt from diminution, by being compelled to allow participation therein by those not having presented their claims within the prescribed period; a bar on which the heir or legatee may insist, for the exclusion of all claims not presented, which would reduce or exhaust the assets, otherwise subject only to pay legacies, or to distribution. *McBroom v. Governor*, 6 Port. 32; *Thrash v. Sumwalt*, 5 Ala. 13. The absence of the administrator from the State will not prevent the bar from attaching, nor will his death occurring after the time has commenced running. *Br. Bank Decatur v. Hawkins*, 12 Ala. 755; *Lowe's Adm'r v. Jones*, 15 Ala. 545. The personal representative cannot, after the expiration of the statutory period, revive a claim, by a promise to pay it. *Br. Bank Decatur v. Hawkins*, 12 Ala. 755. Knowledge of the existence of the claim, on the part of the personal representative, no matter how full and complete, will not dispense with an actual presentment, or something equivalent thereto. *Jones v. Lightfoot*, 10 Ala. 17. This construction harmonizes with the construction of similar statutes, framed to accomplish similar purposes in other states. *Brown v. Anderson*, 13 Mass. 201; *Thompson v. Brown*, 16 Mass. 172; *Heath v. Weed*, 5 Pick. 140; *Spalding v. Butts*, 6 Conn. 23; *Gookin v. Sanford*, 3 N. H. 491; Ang. on Lim. § 170.

The language of the statute is clear, unambiguous, and comprehensive. Words more significant to express every demand to which a personal representative can or ought to respond, or which can charge the assets in his hands subject to administration, or more expressive of every legal liability, resting upon the decedent, could not have been employed. "All claims against the estate of a deceased person," is the language of the statute. A claim, said Judge STORY, in a just, judicial sense, is "a demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty." 16 Peters, 615. All claims

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whether absolute or conditional, whether payable presently or in the future, are within the statute. *Jones v. Lightfoot*, *supra*; *King & Barnes v. Mosely*, 5 Ala. 610; *Smith v. Grant*, 2 Root (Conn.), 142. It is only contingent claims — claims which may never accrue — that fall within the provision postponing a presentment “until eighteen months after the same have accrued;” such as the liability of a surety who has no demand against the principal until his payment of the debt for which he is bound. *Neil v. Cunningham*, 2 Port. 171; *McBroom v. Governor*, 6 Port. 32; *Cawthorne v. Weisinger*, 6 Ala. 714; *Hooks & Wright v. Br. Bank Mobile*, 8 Ala. 380; *Winter & Gayle v. Br. Bank Mobile*, 23 Ala. 762. Or the claim which was the subject of suit in *Pinkston v. Huie* (9 Ala. 252), dependent on a future contingency which might never happen. “But the contingency excepted from the operation of the statute cannot depend upon the action of the court in granting or refusing relief. If the party is not entitled to a judgment or decree at the hands of the court, he has no claim against the estate, and there is an end of the controversy. If he is, it cannot be considered as contingent, whether it will be granted or refused.” *Jones v. Lightfoot*, *supra*. At common law, an executor or administrator, was charged with notice of all judgments existing against the testator, or the intestate. 2 Williams on Ex’rs, 922. Yet judgments higher in dignity than any other claim recognized by law must be presented, or they fall within the bar of this statute. *Ready v. Thompson*, 4 St. & Port. 52. *Ray v. Thompson*, 43 Ala. 454. In *Elleson v. Halleck* (6 Cal. 386), in construing a similar statute, said the court: “The word ‘claim,’ employed by the statute, is sufficiently comprehensive to include every species of charge or account against an estate, whether the same be recorded or not.” In *Foster v. Maxey* (6 Yerg. 224), a suit to recover of the administrator of a surety of a guardian the amount due from the guardian on his removal, during the life of the surety, was held to be a debt barred by the operation of a statute limiting the time within which suits against executors or administrators could be commenced. In *Williams v. Conrad* (11 Humph. 412) it is held, that the statute declaring the creditors of any deceased person should make their claim within seven years after the death of such person, embraced all persons having demands originating from contracts or agreements. A similar construction was placed on a statute of Arkansas, requiring the presentment of all claims and demands against the estate of a deceased person. “All claims capable of being asserted in any court of justice, either of law or equity, existing either at the time of the death of the deceased, or coming into existence at any time after the death, and before the ex-

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piration of two years," excluding only inchoate and contingent demands, were declared within the statutory bar. *Walker v. Byers*, 14 Ark. 246. On the dissolution of a partnership, the active partner by agreement with his copartner retained possession of the partnership property, promising to pay the partnership debts. The partnership property became so intermingled with the individual property of the active partner, that on his death it was not distinguishable and separable. To a bill filed for an account and settlement of the partnership, and a decree against the personal representatives and heirs of the active partner, for the copartner's share of the partnership property, the statute of limitations of Massachusetts, barring suits against personal representatives not commenced within four years from the time of their accepting the trust, was pleaded as a bar. The statute was declared not to apply to claims on specific property held in trust by the decedent, and which passed to the possession of the personal representative or heir; but if the property had no ear mark, and was not distinguishable from the rest of the property of the deceased, the party entitled to it was but a general creditor whose claim was barred by the statute. *Johnson v. Ames*, 11 Pick. 173.

The principle on which these authorities rest is, that every claim or demand which can be made the foundation of suit against the personal representatives, and the recovery of which will diminish the assets in his hands, subject to administration for the benefit of creditors, of heirs or legatees, falls within the operation of statutes prescribing a bar to suits against him. The same principle must be, and has been applied to our statute of non-claim. The purpose of that statute, as of the similar statutes in other States, on which the decisions cited were made, is the exemption of assets subject to administration from all liability to claims not presented, within the prescribed period. The exemption is intended to promote the speedy settlement of administrations, the payment of debts, the satisfaction of legatees, and the final distribution of the assets. The whole policy of the statute, and of the system of which it forms a part, would be defeated, if such was not its operation. The statute as it is now found in the Code was originally enacted in 1815. Clay's Dig. 195, § 17. By the common law as it prevailed here, when this statute was enacted, it was only actions *ex contractu*, causes of action originating in contract, that survived for or against personal representatives. *Blakeney v. Blakeney*, 6 Port. 109; *Nettles v. Barnett*, 8 Port. 181. The common law rule was modified and changed by legislation, from time to time, until now all actions on contracts, express or implied, and all personal actions, except for

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injuries to the person or reputation, survive in favor of or against the personal representative. R. C. § 2555. It cannot be denied that as the causes of action which would survive against a personal representative were enlarged, they fell within the operation of the statute, and if not presented within the period prescribed, they are barred.

The claim now preferred is to charge the assets for administration, in the hands of the personal representative of the surety, with the satisfaction of a *devastavit* imputable to the principal long prior to the death of the surety. It would nullify the purposes of the statute to exempt this claim from its operation. Its satisfaction would as certainly divert the assets from distribution, and disappoint the claims of the distributees, as the satisfaction of a promissory note made by the intestate, or of a judgment existing against him. There is nothing in the character of the liability which will deprive it of the character of a claim requiring presentation. A *devastavit* at common law was a tort, and on the death of the personal representative, all remedy at law was lost, on the maxim, "*Personalis actio moritur cum persona*." The only remedy was in equity, where the administration was treated as a trust. *Taliaferro v. Barrett*, 3 Ala. 670; 2 Williams on Ex'rs, 1565, 1712; 2 Red. on Wills, 238. The defect in the common law was remedied by acts of parliament. 30 Car. II. c. 7, and 4 & 5 Wm. & M. c. 24, § 12; 2 Williams on Ex'rs, 1712. Under these statutes, it became the settled law, that a party injured by a *devastavit* was a simple contract creditor, within the operation of the English statute of limitations of six years. 2 Williams on Ex'rs, 1565. The general rule of the common law is, that breaches of trust are mere simple contract debts, unless they arise from the violation of a sealed instrument, and then they partake of the character of the instrument, and become debts due by specialty. 2 Red. Wills, 238. A *devastavit* here at law and in equity is treated not only as a breach of trust, but as a breach of contract,—a non-performance of the condition of the bond given,—and like all other breaches of contract, actions for its redress survive against the personal representatives of principal or of surety. There can be no claim springing from a breach of contract, not within the statute of non-claim.

The counsel for appellants concede the claim made by the bill is within the statute of non-claim, but they insist it is within the exception of the statute in favor of "heirs or legatees claiming as such," and rely on the authority of *Harrison v. Harrison*, 39 Ala. 489. That case sustains the proposition. We cannot however follow it as a correct exposition of the law. That it operates to narrow the benefits of the statute, no more striking illustration could be afforded than this case presents.

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The object of the statute is the protection of the personal representative, the creditors, and the heirs or distributees of the estate against which the claim is preferred,—not of any other estate, certainly not of representative, creditor, or heir of another estate, which is to be enlarged by diminution of the estate to be charged. These will be protected by the statute, when a claim is preferred against the estate, to which they stand in the relation of representative, creditor, heir, or distributee. The whole theory of the statute is to create a defence broader in its operation than the statute of limitations, not only barring remedies, but extinguishing debts and liabilities. From the operation of this statute is excluded persons not *sui juris* (who are generally excluded from the operation of the statutes of limitations), infants and *non compotes mentis*. These are allowed to present their claims within eighteen months after the removal of their disabilities. Having made this exception, the statute declares it shall not apply “to heirs or legatees claiming as such.” R. C. § 2340. The effect of the decision in *Harrison v. Harrison*, *supra*, is, that whenever heirs or legatees are claiming in that character, no matter against what representative, or of what estate, because of the character in which they claim, they are excepted from the operation of the statute. If that be true, it leads to the result that they are excepted entirely and absolutely,—there is no event in which the statute can ever operate on them. Infants and persons of unsound mind fall within its operation, if within eighteen months after the removal of their disabilities they do not present their claims. But heirs or legatees fully *sui juris*, in no contingency or event are required to present their claims, no matter of what estate they claim. It is competent for the legislature thus to except them, or any other class of individuals, from the operation of a statute, but the exception should be clearly expressed, and not deduced from language obscure and ambiguous, if that is its interpretation. As we have said, a new system in reference to administrations was being established, and of that system this statute was a part. Heirs or legatees, by other provisions of the statutes, were precluded from claiming payment of their legacies, or compelling distribution, until eighteen months after the grant of letters testamentary, or of administration. Being thus precluded, that a provision should be introduced into the statute of non-claim excepting their claims as heirs or legatees, from its operation, was indispensable to the harmony of the system. And it was in this view that the exception was introduced, to preclude the possibility of a construction that would enable a personal representative, who is their trustee, to interpose the statute as a bar to distribution of the assets in his hands. Adopting this construction of the exception renders it harmo-

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nious with the policy pervading the system of which it is a part. Any other construction contravenes this policy, and as to parties claiming as heirs or legatees renders the statute of no avail, and as to such parties subjects an administration to all the evils incidental to an administration governed by common law principles. The reason assigned in *Harrison v. Harrison* against this construction is, that it denies to the exception all operation whatever, because without the exception the statute of non-claim would not embrace the claims of heirs or legatees, to inheritances or bequests, coming to them directly from the estate of which they are heirs or legatees. It could as well be said, that every statute, which is affirmatory or declaratory of the existing law, is without operation. Every statute book abounds with such statutes, and there are numerous sections of the Code of this State, which are mere repetitions of the common law, as pronounced by the decisions of this court. The statutes of Elizabeth denouncing fraudulent conveyances, were but an affirmation of the common law. *Adams v. Broughton*, 13 Ala. 739. It was never permitted to a debtor fraudulently and covinously to alienate or grant his property for the purpose of hindering or delaying his creditors. Such alienation or grant was as void at common law as under the statute. Because this is true, it has never been supposed the statute was incapable of operation, or that any other field of operation for it should be sought than was given the common law principles it declares and affirms. The first chapter of the Code is devoted to the signification of words and phrases as used in the Code. The meaning declared is generally that which the common law would have affixed, in the absence of these declaratory provisions. "Property," would have included real or personal property; "real property," would have been deemed coextensive with lands, tenements, and hereditaments; a "month," or a "year," would, if not otherwise expressed, have signified a calendar month or year. The time within which an act was to be done, would have been computed by excluding the first and including the last day. *Owen v. Slatter*, 26 Ala. 549. Numerous instances will suggest themselves to the professional mind, in which the Code is but an expression of a rule of the common law, and often of decisions of this court. To avoid so regarding them, and ascribing to them some other field of operation than that given them at common law, no meaning has been imputed to them which would defeat a well defined policy the statutes intend to advance. The statute we are considering affords an illustration of the introduction into the Code of the law as declared by judicial decision. The statute of 1815 did not declare the revival of a pending suit, or the commencement of a suit within eighteen months, should operate as a present-

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ment. This court declared such suit was a sufficient presentment. *Hunley v. Shuford*, 11 Ala. 203. This decision forms substantially now a part of the statute of non-claim. R. C. § 2242. We do not regard it as an objection to the construction we place on the statutory exception under consideration, that thereby it is rendered merely affirmatory of the law as it existed, and would have been without the exception.

The claim of "heirs or legatees claiming as such," excepted from the operation of the statute of non-claim, is not a claim *against*, but a claim *to* the estate. It is a claim to that portion of the estate to which, if the person through whom they claim died intestate, they are entitled by virtue of the statutes of descents and distributions, or if he died testate, to which they succeed under his last will. If the administrator or executor dies, having specific property in his hands unadministered or unconverted, then as to such property the claim to it, whether preferred by heirs or legatees, or a succeeding representative, is not within the statute of non-claim. It is a claim of title, which, like all other claims of title, is not a claim chargeable on the assets in the hands of the personal representative for administration. *Locke v. Palmer*, 26 Ala. 312; *Johnson v. Ames*, 11 Pick. 173. When however, the claim is for a *devastavit* committed by an administrator or other trustee, it is a claim for a debt, not in its technical sense of an ascertained sum, but for a sum of money due from one person to another, the amount to be rendered certain by evidence. The relation existing between the parties is, then, that of debtor and creditor. 2 Red. on Wills, 238; 2 Williams on Ex'rs, 1765. *Johnson v. Ames*, *supra*; *Trecothick v. Austin*, 4 Mason, 29. Between the surety of an executor, administrator, or guardian, and an heir or legatee, no other relation than that of debtor and creditor can exist. The relation of trustee and *cestui que trust* does not and never did exist between them. The privity between them originates in, and is dependent upon the bond. When the heir or legatee seeks a recovery from the surety for a breach of the bond, he claims as a creditor only. From his relation of heir or legatee to another, he deduces his right as a creditor, and that relation is indispensable to his character of creditor. As we have already said, on another branch of this case, it is only after the heir or legatee has fixed the default of the executor or administrator at law, by the judgment or decree of a competent court, that he can maintain any action at law on the bond. Until then, he has no cause of action at law against the surety. The cause of action is then *ex contractu* founded on the bond, and is that of a creditor, in form, characteristics, and rights. It does not vary from that of a creditor of the decedent, who has obtained judgment against the executor or administrator.

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The case of *Harrison v. Harrison*, *supra*, has stood for nearly eleven years. So far as we can discover, it has not, on the point we have considered, been questioned or affirmed. It does not announce a principle on which title to property may have been acquired or lost; it cannot be supposed to have become an element of contracts, or to have affected business transactions. We do not perceive any result it can have induced, other than passiveness in the presentment of claims against deceased persons, on the part of a particular class, which in others would have been laches fatal to their claims. We have the most profound respect for the court pronouncing the opinion in that case, and are deeply impressed with the necessity of a strict adherence to precedents. We cannot resist, however, the conviction, that it impairs the beneficial operation of one of the most important statutes to be found in our statute book, — a statute founded on the wisest public policy, affording protection to the living and the dead; a statute, which gives repose to society, quiets litigation, removes temptations to fraud and perjury, secures titles, and preserves domestic peace. We are constrained, therefore, to declare it overruled, so far as it may conflict with this opinion.

The result is, the demurrer of the defendant Hannon was well taken on the ground of the statute of non-claim. The demurrer of the defendant McLemore was not well taken on any of the grounds specified.

The decree is reversed, and the cause remanded for further proceedings, not inconsistent with this opinion.

JUDGE, J., having been of counsel for appellees, not sitting.

Malone, Administrator, v. Hundley.

Action on Common Counts.

1. *Non-claim; what sufficient to prevent bar of.* — Suggestion upon the record of defendant's death and an order of revivor upon *scire facias* to his administrators, the writ being served within eighteen months after the grant of administration, is a sufficient presentation to save a claim from the bar of the statute of non-claim of eighteen months.

2. *Presumptions on appeal; what will not be indulged.* — The appellate court will not presume that the complaint was amended by the addition of a certain count, from the mere fact that leave was given so to amend, if such presumption will militate against the judgment below.

APPEAL from Circuit Court of Limestone.

Tried before Hon. JAMES S. CLARK.

The opinion states the case.

CABANISS & WARD, for appellant.

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HOUSTON & PRYOR, *contra*.

MANNING, J. — Appellee brought suit in 1866 against Thomas B. Collier, appellant's intestate, upon a complaint for money due by account; for money lent; for money due upon an account stated between plaintiff and defendant; for goods, wares, and merchandise, sold by plaintiff to defendant; and for money paid by plaintiff at defendant's request.

At the Spring term, 1870, of the court, the death of Collier was suggested, and an order made that the administrator of his estate be made defendant by *scire facias*; which writ was issued, and was served on the administrator June 18, 1870.

The cause came to trial on the 23d of April, 1873, at which time defendant pleaded in short, by consent, the general issue, *non-assumpsit* by his intestate, and the statute of non-claim of eighteen months. The judgment-entry of the same date recites that the parties came by their attorneys, and leave was "granted by the court to the plaintiff to amend his complaint by adding a count for money had and received by the defendant from the plaintiff; and thereupon also came a jury of good and lawful men," &c., who found a verdict for plaintiff, on which a judgment was rendered in his favor.

It does not appear from the record that the amendment authorized by the court was in fact made. And if we should consider a count as made in the form mentioned in the judgment-entry, it would not show any cause of action. Was the "money had and received by defendant from the plaintiff" received as a *payment* from the latter to defendant, or as a gift, or as a loan, or on deposit to be returned? Nothing appears in the entry to show a liability or basis of liability in favor of plaintiff. It was probably intended that a count should be added "for money had and received by defendant for the plaintiff," or for his use. But no such count was filed; and we must presume the trial was had upon the complaint as originally filed.

A bill of exceptions is set forth in the record, which recites that the cause was "an action of *assumpsit* for conversion of the plaintiff's cotton by defendant's intestate; that no evidence was given or offered of any indebtedness of the defendant's intestate to the plaintiff," *except for the conversion* of the cotton; that it was proved that "the defendant was appointed administrator of his intestate's estate on October 11, 1869; and that no evidence was given or offered showing, or tending to show, that the claim in suit was presented to the defendant, except the record of the proceedings in this suit," in which proceedings the death of Collier was suggested, and his administrator

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made a party defendant, by service upon him on the 18th of June, 1870, of the *scire facias* aforesaid; and that upon this evidence the court charged the jury, "that the revival of the suit against the defendant was a compliance with the provisions of the statute of non-claim, and instructed them to find for the plaintiff upon the issue of defendant's plea of *non-claim*, if they believed the evidence," to which charge and instruction defendant excepted. No objection was made by defendant to the charge of the court, on the subject of the indebtedness of defendant's intestate to plaintiff, or on the evidence in respect to it. The only error alleged is supposed to be contained in the charge that the revival of the suit by the service in June, 1870, of the *scire facias*, upon the defendant, as administrator of Collier, was a sufficient presentation of the claim according to the statute.

To sustain this allegation of error, appellant's counsel assume that the verdict of the jury and judgment of the court must be predicated on a count *for money had and received*, filed for the first time, under the leave granted by the court, at the trial term in 1873. And they insist that this amendment then, of the complaint, cannot, by relation back, be considered as a part of the original complaint, and thus become a claim that was presented to the administrator by the revival of the suit against him in 1870. Many authorities are cited to support this proposition.

The argument is ingenious, but there is no foundation for it. The count supposed is not in the record. The verdict was rendered upon the original complaint only. And no objection was made to the relevancy or sufficiency of the evidence to sustain the verdict upon that complaint; and we cannot presume that there was any error in what was done or allowed by the court in that respect. *King v. Crocheron*, 14 Ala. 822; *Greene v. Tims*, 16 Ala. 542; *Ib.* 742.

Counsel, doubtless, had in mind, when the bill of exceptions was prepared, and in adopting their line of argument, cases in which it has been held that *assumpsit* will not lie for any tortious act, not even for the conversion by a defendant to his use of property of the plaintiff, except in a case in which defendant has sold the property and received money for it, which *ex æquo et bono* belongs to plaintiff, and may, therefore, be recovered by him in *assumpsit*, on a count for money had and received. Wherefore, counsel assume that it was only upon such a count that the verdict in this cause was rendered. *Fuller v. Duren*, 36 Ala. 73.

But we do not know what the evidence at the trial was. True, it is said in the bill of exceptions that this cause was "an action of *assumpsit* for the *conversion* of plaintiff's cotton."

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But this, we are bound to know, is incorrect, when we read the complaint; and then it is added, that "no evidence was given or offered of any indebtedness of the defendant's intestate to the plaintiff, *except* for the conversion of the cotton." But there may have been an indebtedness for, *or on account of*, this. Consistently with that recital, it may have been shown that this conversion by deceased of plaintiff's cotton arose out of a mistake admitted by the parties; that thereupon plaintiff presented an account setting forth the value of the cotton to deceased, which he examined, found to be correct, and assented to, as an account stated between them; and that proof of this was presented to the jury. We must presume that the evidence — whatever it was — was relevant and sufficient under the complaint; for no objection was made to it and the court was one of general jurisdiction, in which *omnia præsumuntur rite esse acta*.

This being so, there cannot be any doubt that the revival of the suit within eighteen months against the administrator of deceased was a sufficient presentation to him of the cause of action. Rev. Code, § 2242; *Garrow v. Carpenter*, 1 Port. R. 359; *Hunley's Ex'rs v. Shuford*, 11 Ala. 203.

Error must be affirmatively shown; it is not enough that an appellate court cannot see that the judgment of the primary court was right; unless shown to be wrong, the presumption of correctness arises. *Ducksworth's Ex'rs v. Butler et al.* 31 Ala. 164; *English's Ex'rs v. McNair's Adm'rs*, 34 Ala. 40.

The judgment of the court below is affirmed.

Watson & Wife v. Stone.

Petition for Review and Reëxamination of Cause under Ordinance No. 40 of Convention of 1867.

Ordinance No. 40 of Convention of 1867, construed. — Ordinance No. 40 of the Convention of 1867, to allow widows, orphans, and others to review the validity of sales and settlements of estates made by guardians, trustees, &c., passed February 6, 1867, was mandatory upon the general assembly to pass proper laws to carry its provisions into effect; but in the absence of such legislation was inoperative and conferred no power on the courts.

THIS was a petition filed in the supreme court, on the 17th day of July, 1870, by A. B. Watson and his wife, formerly A. V. Stone, praying that a judgment of the probate court of Lowndes county, rendered on the 25th day of November, 1865 (whereby her guardian, Warren T. Stone, on his final settlement was, as petitioners allege, erroneously and improperly

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allowed credit for certain moneys invested in Confederate bonds and treasury notes), and the judgment of affirmance thereon rendered by the supreme court, on petitioner's appeal, at its January term, 1867, be set aside, vacated, and annulled; and that "the questions as to the correctness of the allowance of said credits be tried *de novo* by the supreme court of Alabama," and for general relief. In the view which the court took of the case it is not necessary to set forth more in detail the statements in the petition.

SAMUEL F. RICE, for petitioners.

T. H. WATTS, *contra*. — The ordinance of the Convention of 1867, upon which the petition is based, affords no support to the petition.

1. If valid at all, it simply makes it *obligatory upon the legislature* to pass proper laws to authorize the courts to review and reëxamine certain decisions and judgments. It is not self-executing, and does not of itself profess to give any rights. *Groves v. Slaughter*, 14 Peters; *Pope v. Pearce*, 42 Ala. Its loose and meaningless language shows this.

2. If it be conceded that it is self-executing, it has no application to the supreme court; for it cannot try cases *de novo*, in any proper technical sense.

3. Whatever may be the powers of conventions in general, and they are not ordinarily held to be possessed of legislative powers, the Convention of 1867 had no such power. The powers of the Convention of 1867 were specifically limited by the act of Congress which authorized it to assemble. Even if called without restrictions, the convention had no legislative powers. *Jamison on Constitutional Conventions*, §§ 418-430, and cases there cited.

BRICKELL, C. J. — "It is most unquestionably true, that after the final adjournment of this court it ceases to have any power over its records, other than such as is incident to all courts of general jurisdiction, that of correcting clerical errors where the record affords matter upon which to base such correction. After its final adjournment, its judgments are absolute and conclusive, and the court has no power over them." *Vandyke v. State*, 22 Ala. 57.

The petitioners, not controverting this undeniable principle, claim that the court has power by virtue of Ordinance No. 40, of the Convention of 1867, to vacate a judgment rendered against them at the January term, 1867. The ordinance reads as follows, viz. : —

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“AN ORDINANCE,

- “To allow widows, orphans, and others, to review the validity of sales and settlements of estates made by guardians, trustees, &c.

“*Be it ordained by the People of the State of Alabama in Convention assembled*, That it shall be obligatory upon the legislature to pass such laws as may be necessary to authorize and direct the courts of probate, courts of chancery, and all other courts of this State, to reëxamine and review all decisions heretofore made in cases in which the validity of sales of persons acting in a fiduciary capacity as executors, administrators, guardians, trustees, or otherwise, of property for Confederate bonds, treasury notes, or other securities, has been passed upon; and all decisions in which credits have been claimed by such persons, in respect of receipts or payments in such funds or securities, shall have been passed upon; and such revisions may be made on the petition of any one of the parties injured by the decisions of such courts in which the question shall be tried *de novo*: Provided, such petition shall be filed within three years from this date, except in the case of minors and unmarried [married?] women, who may proceed by petition within one year from the removal of the disability of marriage or infancy; and when judgment shall be rendered in favor of such petitioner, the real estate or property so sold shall be liable to the satisfaction of such judgment: Provided, nothing herein contained shall authorize such petition, or to recover judgment for any property in shares.

“Passed, February 6, 1867.”

The subject of the ordinance is of the greatest importance, and it is to be regretted that the intention of the convention in its adoption, and the extent of its operation, are not more clearly expressed. Its different parts are rather contradictory and inconsistent, and we are not sure that any construction, which may be given it as a whole, will conform to the intention of its framers. Lord Coke says: “The best expositor of all letters patent and acts of parliament are the letters patent and the acts of parliament themselves, by construction, and comparing all the parts of them together.” It has been said by this court, that “sound exposition requires effect to be given to every significant clause, sentence, or word in a statute.” *Spivey v. State*, 26 Ala. 101. Or, as expressed in another case, “Statutes are to be so constructed, if possible, as to give some effect to every clause, and not to place one portion in antagonism to another.” *Brooks v. School Comm’s Mobile*, 31 Ala. 227. The first sentence of this ordinance evidently does not confer on the courts authority to reëxamine and review the

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decisions to which it refers. By its very terms, its whole purpose is to declare that it shall be obligatory on the legislature "to pass such laws as may be necessary to authorize and direct" the courts to review and reëxamine certain decisions. On the courts it conferred no power, and imposed no duty. On the legislature it imposed the duty of conferring on the courts a power they could not exercise in the absence of legislation, — a power denied to them by the common law, — that of reviewing, reëxamining, altering, or modifying final judgments, orders, or decrees, after the expiration of the term of their rendition. If this clause of the ordinance stood alone, without the succeeding clauses or sentence, the ordinance would be complete in itself, — capable of operation, and clear in construction. While it would confer no power on the courts, it would not only authorize, but command, the legislature to confer such power. *Pearce v. Pope*, 42 Ala. 319.

The subsequent clauses render the ordinance obscure. They declare the revisions it authorizes may be made on petition of any party injured by the decisions, and that the question should be tried *de novo*, limiting the right to apply for revision to three years from the date of the ordinance, with a saving of the rights of married women and infants. These clauses would seem to indicate that the legislative intent was that the courts should at any time, within three years from the adoption of the ordinance, make the revisions on the petition of any party injured. Disconnected from the preceding sentence, they could be construed as conferring power on the courts, and prescribing the mode in which it should be exercised. If that construction is now given them, it renders the mandatory words of the preceding sentences without meaning or effect, and produces a palpable inconsistency and contradiction between the several clauses. If the ordinance is construed as commanding the legislature to pass the laws necessary for the review and reëxamination of the decisions to which it refers, prescribing a petition as the remedy to be pursued, and three years from the adoption of the ordinance as the period in which the remedy must be pursued, effect is given to its several clauses, and it is as a whole harmonious. This is the exposition we are compelled to make, under the clearly defined rules of construction to which we have referred. The legislature not having performed the duty cast upon it by the ordinance, and the ordinance by its terms expiring after the lapse of three years, the court is without power to entertain the application made in this cause, and it must be overruled.

MANNING, J. — I concur in the conclusion announced by the court, for other reasons than those set forth by the chief justice.

[Breene v. McCrary.]

Breene v. McCrary & Co.*Trial of Right of Property.*

1. *Mortgage of personalty; when valid.* — Personalty passes by a mortgage of both personal and real property, to which the mortgagor affixes his mark without an attesting witness, if its execution is acknowledged before a proper officer who duly certifies it.

2. *Same; when properly admitted to record.* — Upon such an acknowledgment and certificate, such mortgage is properly admitted to record.

APPEAL from the Circuit Court of Hale.

Tried before Hon. M. J. SAFFOLD.

An attachment, issued by a justice of the peace and returnable before him, at the suit of appellees and against one Muse, was levied upon a bag of cotton as his property. Appellant thereupon made the usual affidavit and bond, and a trial of the right was had before the justice, and from his decision, in favor of appellees, an appeal was taken to the circuit court. The plaintiffs in attachment (appellees) relied upon a mortgage duly executed by Muse, on the 3d day of June, 1871; the claimant (appellee) offered in evidence a mortgage executed on the 1st day of February, 1871, by Muse, by making his mark only, and without any attesting witness, but it was acknowledged before a justice of the peace, and certified by him in due form, and recorded in the proper office on the 13th day of April, 1871. Both mortgages covered the property claimed, and the latter mortgage covered a tract of land also. It was admitted that plaintiff in attachment had no *actual* notice of the mortgage of appellee.

The court charged the jury, on the written request of plaintiff in attachment, that if they believe the evidence, they must find for the plaintiff, and the claimant excepted. The claimant then requested the court, in writing, to charge the jury that if they believe the evidence, they must find for the claimant. The court refused to give this charge, and claimant excepted. The giving the first charge, and refusing to give the second charge, are now assigned as error.

COLEMAN & SEAY, for appellant.

W. & J. WEBB, *contra*.

BRICKELL, C. J. — Sections one to eight, inclusive, of the Code, are devoted to a definition of words and terms as used in the Code. Among others, it is declared that "signature," or "subscription," when used in the Code, includes mark, where the person cannot write, his name being written near it, and

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witnessed by a person who writes his own name as a witness. We shall not now express any opinion as to the effect of signatures or subscriptions made by a mark, and not attested, when signature or subscription is required, or whether invalidity is to be imputed to them, or whether by other evidence of execution the want of an attestation can be supplied.

The instrument in question here is a mortgage of real and personal property, and its execution was acknowledged before an officer having authority to take the acknowledgment, who duly certifies it. It was on this certificate properly recorded. The acknowledgment and certificate supplied the want of a witness to the signature. This is certainly true, so far as the instrument operates as a conveyance of real property, by the express terms of the statute. R. C. § 1536. The equity of the statute extends to a conveyance of real and personal property. Otherwise such conveyance as to the lands would be good, when executed by a party who cannot write, and whose mark must be attested by two witnesses; and invalid as to the personal property, the title to which may pass by parol, or by a writing signed by a party incapable of writing, his mark being attested by one witness only. This would be the result of statutes, which, when construed together, require greater formality and ceremony in passing the title to real property, than in passing the title to personal property. The acknowledgment dispensed with the necessity of an attesting witness, if one was necessary under the first section of the Code. The rulings of the circuit court were adverse to this view, and the judgment is reversed and the cause remanded.

Hill, Administratrix, v. Huckabee.

Action on Note by Payee against Maker.

1. *Decision reaffirmed.*—The decision in the case of *Riddle v. Hill*, in MS., reaffirmed.

2. *Judicial proceedings during late war.*—Judicial proceedings, had in the courts of this State during the late war, are valid and binding in all respects, save where they conflict with the Constitution and laws of the United States, or tend to impair the just rights of citizens thereunder.

3. *Estoppel.*—One who has contracted with the administrator in his representative capacity cannot, when sued by him on the contract, plead *ne unques administrator*.

APPEAL from Hale Circuit Court.

Tried before Hon. M. J. SAFFOLD.

This suit was instituted by appellant, as administratrix of the estate of Charles W. Hill, deceased, on the 8th day of March, 1866, on a note given by appellees on the 10th day of

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February, 1863, and payable on the 1st day of March, 1864, to appellant as such administratrix. The complaint avers that the note was given for the purchase of certain personal property of the estate of Charles W. Hill, deceased, which was bought by one of the defendants at a sale thereof made by plaintiff as administratrix of the estate, under and by virtue of an order of the probate court of Greene county, made on the 5th day of January, 1863.

The pleas were, in short: 1st. *Non-assumpsit*; 2d. Plaintiff was not administratrix of the estate at the date of the note; 3d. Nor at the date of the commencement of the suit; 4th. She was not such administratrix at the commencement of this suit, and was not when the pleas were filed; 5th. That the note was given for the purchase of a negro, the property of the estate of Charles W. Hill, deceased, at a pretended sale by plaintiff as administratrix of the estate, on February 10, 1863, and that plaintiff was not such administratrix, and such sale was illegal and void. There were four other pleas, but they were demurred to, and the demurrers sustained.

Plaintiff joined issue on the first plea, and replied to the 2d, 3d, 4th, and 5th pleas, by averring and setting out at length her appointment as administratrix of the estate in 1862, by the probate court of Greene county, and the subsequent proceeding therein, including the order authorizing her to sell the property described in the complaint; her report of sale and its confirmation by the court; the decree of insolvency and the removal of the estate to Hale county probate court; also her continuation in office as administratrix, by the latter court, in 1869, on her final settlement after the decree of insolvency.

On demurrer by defendants to this replication, the court held that the replication was well filed as to the 2d and 5th pleas, but that it was no answer to the 3d and 4th pleas.

The record shows an admission by counsel, on both sides, that "the consideration of the note sued on was the purchase of a negro slave, named George, the personal property of the estate of Charles W. Hill, deceased, which was sold by plaintiff and bought by one of the defendants at the sale referred to, in a transcript offered in evidence from the probate court of Greene county. This transcript shows that the sale was made by appellant as such administratrix on the 10th of February, 1863, under an order of said court, made on the 5th day of January, 1863; and it also shows that appellant was appointed administratrix of the estate by the same court on the 20th day of October, 1862. On May 11, 1868, the estate was duly declared insolvent; on the 14th day of January, 1869, it was, by decree of the court, transferred to the probate court

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of Hale county, and in the latter court the administratrix made her final settlement under the decree of insolvency, and she was duly continued in the administration. At the time the sale was made and the note given, all the parties resided in the State of Alabama.

The court refused to charge the jury, at the request of plaintiff, that she was entitled to recover; and the court then charged the jury that if they believed the evidence, they must find for defendants. The errors assigned are, the sustaining the demurrer to plaintiff's replication to defendant's 3d and 4th pleas; the refusal to give the charge requested by plaintiff; and the charge given.

WALLER, PITTMAN & WALLER, for appellants. — Since the trial of this cause in the court below, this court has decided that the doctrine declared in *Bibb & Falkner v. Avery* (45 Ala. 691) is not applicable to a suit on a note payable to the plaintiff, because the contract establishes the privity, and the words "as administrator" may be regarded as surplusage, and as no part of her right to sue. *Erwin & Jones v. Hill*, June term, 1874. There is nothing in the position of appellee's counsel, that the order of sale was void because made at a special term of the probate court, when the cause was neither set for hearing at said term nor continued to it by order entered at a previous term. The position, that a defendant must have a verdict in a suit on a promissory note because the plaintiff, thinking it advisable, introduces a transcript of the application and decree without introducing a transcript of every order made by the court, is not consistent with the rules of pleading. 1 Stewart, 500-4.

W. & J. WEBB, *contra*. — The capacity of appellant to maintain this action is now a settled question. *Erwin & Jones v. Hill*, June term, 1874. The order to sell was void; the petition was set for hearing on the 24th of December, 1872, and the order of sale was made at a *special* term, held January 5, 1863, and no evidence of an order of continuance to this special term is shown. 46 Ala. 501. If the order of sale was void, the sale was also void. 32 Ala. 676; 29 Ala. 511. And the note cannot be recovered on by appellant or any one else. 38 Ala. 647; 12 Ala. 298.

BRICKELL, C. J. — The second, third, and fourth pleas present no defence to the plaintiff's action, and were demurrable. The note on which the suit is founded is payable to the plaintiff individually. The complaint in effect avers that it is assets of her intestate, in her hands to be administered. Suit

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thereon, in her representative capacity, accompanied by this averment, was proper. *Arrington v. Hair*, 19 Ala. 243. To such suit the plea of *ne unques administrator* is not allowable. That plea, as was determined by this court, in the case of *Riddle v. Hill*, last term, is a defence only when at common law the plaintiff was bound to make *profert* of his letters, as his authority to sue. *Profert* was never necessary, except when the cause of action accrued to the intestate. The making a contract with a personal representative is an admission of the representative capacity, dispensing with the necessity of *profert*.

The plaintiff replied separately to the pleas, disclosing her appointment as administratrix by a court of competent jurisdiction. To these replications the defendants demurred, and the demurrer was sustained as to the replications to the third and fourth pleas. The ground of demurrer is, that administration was granted the plaintiff by a court of this State, during the war, and is founded on former decisions of this court, declaring judicial proceedings had in this State, during the war, were to be esteemed as *quasi* foreign. These decisions are in conflict with the decision of the supreme court of the United States in the case of *Horn v. Lockhart* (17 Wall. 570), which this court at the last term announced its purpose to observe as a correct solution of this question. *Riddle v. Hill*, *supra*; *Powell v. Young*; *Tarver v. Tankersly*, last term. The replications were of consequence an answer to the pleas, if they had been good.

The charge given by the court, that the jury should find for the defendants, was doubtless influenced by the same considerations controlling its rulings on the pleadings. The point of controversy between the parties, in the circuit court, seems to have been the validity of the judicial proceedings under which plaintiff derived her authority as administratrix, and her authority to make sale of the personal property of her intestate. These proceedings were supposed to be invalid, because the proceedings of a court recognizing the authority of a government in hostility to the government of the United States. In the cases to which we have referred, this court declared, in obedience to the decisions of the supreme court of the United States, that such proceedings, where they did not offend the Constitution or laws of the United States, or impair the just rights of the citizens thereunder, were to be esteemed valid. We reaffirm those decisions, as announcing the principle by which we propose to be guided. An observance of the decision of this court in *Riddle v. Hill*, at last term, will enable the circuit court to dispose of all the questions this record presents.

We decline passing on the correctness of the refusal of the
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circuit court, to allow the amendment of the complaint as proposed by the plaintiff. That amendment will not probably be desired by the plaintiff, under the decision we have made on the pleadings.

The judgment is reversed and the cause remanded.

Jacob Michael, Jr., v. Marengo County.

Action by Sheriff for Fees under § 4438 Rev. Code.

1. *Sheriff's fees under § 4438 Rev. Code; how paid in Marengo county.* — The "Act to consolidate the fund of fines and forfeitures and the general fund of the county of Marengo," approved February 13, 1871, has the effect to make claims which might accrue under § 4438 of the Revised Code a charge against the county to be paid out of its general fund.

2. *Same; when such claims are barred for failure to present to commissioners' court.* — Under that act, claims not presented within twelve months are barred by Rev. Code, § 909. But claims existing at the passage of said act were not barred if so presented in twelve months thereafter, and the time for such presentation was further extended by the act approved March 4, 1873, to the 1st day of January, 1874.

APPEAL from the Circuit Court of Marengo.

Tried before Hon. L. R. SMITH.

This action was commenced August 27, 1872, by Jacob Michael, Jr., against the county of Marengo, for work and labor done for defendant during the years 1868 and 1869, by plaintiff, as sheriff of said county, and in discharge of his duties as such sheriff, in divers causes and prosecutions in the circuit and county courts of said county, wherein the State of Alabama as plaintiff failed to convict, or said prosecutions were dismissed on plea of *nol pros.*, or executions issued on judgments in said causes were returned "No property found." A demurrer was interposed and overruled, and defendant then filed a plea "in short, by consent, of the statute of limitations, or non-presentation to the court of county commissioners of Marengo county, within twelve months after said claim accrued or became payable under Rev. Code, § 909." The record contains no demurrer to said plea, and it is silent as to what was the issue joined, except so far as we are informed by the charge of the court.

On the trial plaintiff proved that the services were rendered by him as alleged, and that his claim therefor was still unpaid; said claim was not presented to the commissioners' court of Marengo county until February 12, 1872, on which day it was presented to said court, at a regular term thereof, and it was disallowed. On the 13th of February, 1871, an act of the general assembly was approved, consolidating the funds of said county

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known as the fund of fines and forfeitures and the general fund, and constituting them one fund, and requiring that all claims provided to be paid out of the fines and forfeitures fund should be paid out of such consolidated fund. See Acts 1870-1, p. 229. On the 4th day of March, 1873, another act was approved, suspending the operation of § 909 of Rev. Code, on claims against Marengo county, contracted between January 1, 1866, and January 1, 1873, and allowing the holders of such claims to present them at any time before January 1, 1874, to the court of county commissioners.

The court charged the jury as follows: "The plaintiff has sued the defendant to recover for services rendered in his official capacity. The defendant insists that the claims sued for were not presented to the commissioners' court within twelve months after they became due, and are barred. The plaintiff says that the claims are not such as are required to be presented to the court of county commissioners. The court of county commissioners are required to audit all claims against the county, and these claims were no exception to the rule. If, therefore, you believe from the evidence that these claims were not presented to the court of county commissioners within twelve months after they became due, then the plaintiff cannot recover." Plaintiff excepted to said charge and assigns it as error.

JAMES T. JONES and H. A. WOOLF, for appellant. — The record shows that appellant presented his claim for allowance to the commissioners' court on February 12, 1872; this was within twelve months from the approval of the act of February 13, 1871. Acts 1870-1, p. 225; *Grant v. Marengo Co.* June term, 1874. It is true the claims were disallowed in May, 1872, but that does not disprove their *presentation* on the 13th of February, 1872. Moreover, by the act of March 4, 1873, § 909 of the Rev. Code was suspended on all claims presented before January 1, 1874.

REEVES & BARTLETT, *contra*. — The claims should have been presented to the court of county commissioners within twelve months after they *accrued*. Rev. Code, § 909; 44 Ala. 590. The act of 1872-3 is *ex post facto* as to appellant's claims. Although *payable* out of the consolidated fund, they should have been *presented* within twelve months after they became due, and awaited their times of payment.

JUDGE, J. — By an act of the legislature approved February 13, 1871, the fund of fines and forfeitures, of Marengo county, was consolidated with the general fund of the county,

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and all claims against the county, provided to be paid out of the fund of fines and forfeitures, were required to be paid out of the consolidated fund. Acts 1870-71, p. 229.

This court decided at the June term, 1874, that the effect of this statute was to make the fees of officers of court, which might accrue under § 4438 of the Code, a charge against the county, to be paid out of its general fund; and that all such claims must be presented to the court of county commissioners for allowances within twelve months from the time they accrue or become payable, or they will be barred by § 909 of the Code. *Grant v. Marengo County*, June term, 1874.

The claims of appellant, which are the subject of this suit, were in existence at the time the act of February 13, 1871, was passed. It was held in *Grant v. Marengo County*, *supra*, that such claims must be presented for allowance within twelve months from the date of the approval of said act, to prevent them from being barred by the statute. The claims of appellant were presented, as the record informs us, on the twelfth day of February, 1872, which was within twelve months from the time the act of February, 1871, was enacted; and in addition to this, an act of the legislature approved March 4, 1873, temporarily suspended the operation of section 909 of the Code, as to Marengo county, by providing that all *bonâ fide* holders of just claims against the county, which have accrued or become payable between the first day of January, 1866, and the first day of January, 1873, may present their claims respectively, for allowance, by the first day of January, 1874, and not after. The claims of appellant come also within the provisions of this act. It follows that the judgment of the circuit court must be reversed and the cause remanded.

Pippin & Wife v. Jones & Co.

Action against Husband and Wife under § 2376, Rev. Code.

1. *Separate estate; when liable for articles of comfort and support of household.*—It is indispensable to the maintenance of a proceeding, under the Code, to subject the statutory separate estate of the wife, for articles of comfort and support of the household, &c., that the estate should have had an existence at the making of the contract, continuing up to the institution of the suit.

2. *Married woman; capacity to purchase lands.*—The purchase by a married woman of her ancestor's land, under a decree in chancery for division, confers upon her a statutory separate estate, at least, until she elects to repudiate it in a proper way.

3. *Same; improper mode of electing to repudiate purchase.*—Setting up as a defence against a proceeding to condemn the land for articles of comfort, &c., the wife's incapacity to purchase it, is not a proper mode of manifesting her election.

4. *Evidence; separate estate shown by recitals in mortgage thereof.*—If husband and wife mortgage such lands to the sureties on her notes for the purchase-money

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thereof, reciting such sale, her purchase, and that the mortgage is given to indemnify such sureties, such mortgage is admissible evidence to show a separate statutory estate in her to the lands therein conveyed.

5. *Separate estate; liable for necessities furnished family servants.* — Servants necessarily employed and residing in the family are part of the "household," within the meaning of the statute, and necessities purchased for them can be charged upon the wife's statutory separate estate.

APPEAL from the Circuit Court of Greene County.

Tried before Hon. LUTHER R. SMITH.

This was a suit commenced on the 10th day of March, 1871, by appellees against appellants, on an account for goods, wares, and merchandise sold during the year 1869, including the month of January, and it was sought to subject the statutory separate estate of the appellant Mrs. Pippin, wife of George Pippin, to payment of said account, on the ground that the goods, wares, and merchandise were articles of comfort and support of the household, and suitable to the degree and condition of the family and for which the husband would be liable at common law. The evidence showed that the articles sold to appellants were of such a character, except a portion, which were objected to because purchased for the use of the servants belonging to the household. It was admitted by appellants (defendants) that they were married in 1860 in Alabama. The plaintiffs (appellees) offered in evidence a mortgage executed by appellants on the 18th day of February, 1869, reciting that the appellant, Mrs. Sarah Pippin, became the purchaser of certain lands therein described, sold by E. D. Willett, register in chancery, for the sum of \$2,324, for which she executed her promissory note on the 26th of October, 1867, with the mortgagees as her sureties, and conditioned to hold said mortgagees harmless, &c. Defendant Sallie E. Pippin objected to the introduction of the mortgage, because it was irrelevant and incompetent testimony, and because it did not show a separate estate in her under the Code of Alabama in the lands mentioned, at the time this suit was brought; her objection was overruled by the court, and she excepted. It was also proved that said lands had formerly belonged to Sallie E. Pippin's deceased father; that they were sold by said register for division among the heirs of said decedent, in the fall of 1867; that defendants went into immediate possession and continued in such possession up to the time of trial in this cause; that said note was paid and taken up by one of the sureties, and a part of the debt was paid back to the sureties, out of the distributive share of defendant Sallie E. Pippin. There is no evidence of any conveyance of the legal title to said lands ever having been made by the register to the defendants or either of them; the description of the lands in plaintiffs' complaint corresponds with the description in the mortgage.

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The court charged the jury "That if the articles mentioned in said account were reasonably worth the amounts charged, and were purchased by the defendants for the use and benefit of the family and household, and so used by them, and the goods were sold to defendants by plaintiffs in the year 1869, and were for articles of comfort and support of the household, suitable to the degree and condition in life of the family of the defendants, and for which the husband could be responsible at common law, then the separate estate of Sallie E. Pippin is liable therefor; that if, from the evidence in the cause, they believe the property set forth in the plaintiffs' complaint was her separate estate under the Revised Code of Alabama, at the time the articles were purchased, and at the time this suit was brought, then plaintiff was entitled to recover in this action for said goods the amount they were reasonably worth, with the interest from the time the same was due to the time of trial, that for articles purchased for and used in carrying on the farm the defendants were not liable, nor for any articles purchased for the exclusive use of the household, but for articles purchased by defendants for the use of a servant of the household, and used by the servant, defendants were liable, if an article of comfort and support of the household and suitable to their rank and condition in life and for which the husband would be responsible at common law." Defendants excepted to this charge, and requested the court to charge, 1st. If the jury believe the evidence, plaintiffs are not entitled to recover; 2d. If the jury believe the evidence, plaintiffs are not entitled to recover of Sallie Pippin; 3d. Plaintiffs cannot recover for articles sold for the use of the servants of the family; nor for any articles sold defendants during the month of January, 1869, as against Sallie Pippin. Each of said charges was refused, and defendant Sallie E. Pippin excepted, and she here assigns for error the giving the first charge and the refusal to give the charges requested.

W. COLEMAN, for appellants. — It was necessary to aver and prove a separate estate in the wife, both at the date of the contract and the commencement of the suit. *Ravesies & Wife v. Stoddard*, 32 Ala. 599. The facts do not show a separate estate in Sallie E. Pippin, at either of said dates; her purchase and execution of the notes did not make her liable; 29 Ala. 668. No separate estate owned by her at the time of the purchase could have been made liable therefor. 29 Ala. 668; 45 Ib. 337; 33 Ala. 175. The legal title was not conveyed to her, and at most she had but an equity to have the lands sold to repay to her the sum paid her surety out of her distributive share of her father's estate. 35 Ala. 727. The land was liable to

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the mortgage; 48 Ala. 226; and after the law-day it divested the title out of appellees.

A married woman's separate estate is not liable for necessities furnished servants of the family; it is not liable even for articles purchased for her husband. 31 Ala. 442.

CRAWFORD & MOBLEY, *contra*.

BRICKELL, C. J. — It is the accepted construction of the statutory provisions, rendering a wife's separate estate liable "for articles of comfort and support of the household," and prescribing an action at law, as a remedy to enforce the liability, that thereby the capacity of the wife to contract is not enlarged, nor is her personal liability to suit and judgment at law increased. As to the wife, the suit at law is rather a proceeding *in rem* than *in personam*. The judgment rendered, as to her, ascertains and concludes no fact except that she has a separate estate, subject to its satisfaction. It is of consequence a rule of pleading, that to support the proceeding, the existence of this estate must be averred, and that it may be known on what the judgment is to operate, it must be described. The separate estate being an indispensable element of the proceeding, it must exist when the contract is made, out of which its liability arises; and its existence must continue to the institution of suit. If when the contract is made, the estate does not exist, the liability cannot arise; and if it is exhausted or from any cause ceases to exist before institution of suit, there would be no foundation for a judgment as to the wife. This appears to be the reasoning on which the court has often declared that, to support the suit, it must appear from the complaint that the wife had a statutory separate estate, at the making of the contract, continuing to the commencement of suit. *Henry v. Hickman*, 22 Ala. 685; *Cunningham v. Fontaine*, 25 Ala. 644; *Durden v. McWilliams*, 31 Ala. 438; *Sprague v. Daniels*, *Ib.* 444; *Ravesies v. Stoddard*, 32 Ala. 599; *Childress v. Mann*, 33 Ala. 206.

The complaint in this cause conforms strictly to this rule. On the trial to support the averment that the wife had a statutory separate estate in the lands described in the complaint, the plaintiff offered in evidence a mortgage executed by husband and wife in 1869, reciting that in 1867 the wife had purchased the lands at a sale made under a decree in chancery, and conveying them to her sureties for the purchase-money, to indemnify them against loss. The account on which the suit is founded was contracted in 1869, partly before, and partly after the mortgage. To the introduction of the mortgage as evidence, the appellants objected because it did not show or tend to show

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the estate of the wife in the lands was a statutory separate estate. The objection was overruled. Subsequently evidence was given, that the father of the wife died seised of the lands, and they descended to his heirs; that to effect a division, a sale was made by a register in chancery, at which the wife became the purchaser; that she gave a note for the purchase-money, with two sureties, one of whom soon after the making of the mortgage paid it, and has not been reimbursed. The husband and wife, on the purchase in 1867, entered into possession, and remained in possession to the time of the trial. It is insisted the wife had not capacity to make the purchase, and that of consequence she acquired no estate in the lands. Without affirming or disaffirming her capacity to make the purchase, we are satisfied it conferred on her a statutory separate estate, which remains until she shall by some proper proceeding elect to repudiate it. A defence of this suit, is not the proper mode of manifesting that election. If such a defence should be entertained, the consequence would be that she would remain in possession of a valuable estate, her husband taking its rents and profits, and her creditors, who have supplied her and her family with the necessaries of life, set at defiance. In this suit, and for all its purposes, she must be deemed to have in the lands a statutory separate estate, and so the circuit court correctly ruled.

Some articles in the account seem to have been purchased for servants in the family. These, it is insisted, are not properly chargeable on the wife's statutory estate. Servants necessarily employed and residing in the family (and the necessity for their employment was not mooted on the trial) are a part of the "household," within the meaning of the statute. Necessaries supplied them can be charged on the wife's estate.

There is no error in the record and the judgment is affirmed.

Dickson & Co. v. Frisbee.

Action for Work and Labor done Under Contract.

Statute of frauds; contract not to be performed within a year. — A verbal contract entered into on the 21st day of December, 1870, whereby plaintiff agreed to serve as clerk for defendants for a year, commencing on the day thereafter and ending on the 22d day of December, 1871, is a contract to be performed within a year and therefore not within the statute of frauds.

APPEAL from Choctaw Circuit Court.

Tried before Hon. L. R. SMITH.

This was an action by appellee against appellants for the breach of a contract. The testimony showed that appellants

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entered into a contract, verbally, with appellee, by which the latter engaged on December 21st, 1870, to clerk for appellants for a year, commencing on the 22d day of December, 1870, and ending on the 22d day of December, 1871, at a given sum, per month, and that appellants committed a breach thereof in June, 1871.

Appellants (defendants) asked the court to charge the jury "that if they believe from this evidence that the contract between Frisbee and Dickson was verbal, and was made on the 21st of December, 1870, to begin on the 22d of December, 1870, and end on the 22d of December, 1871, such contract is void and plaintiff cannot recover." 2. If the jury believe the contract was a verbal contract, and that the time from which it was made to the time of its completion was beyond the limit of a year, though but for one day, such contract was void, and plaintiff cannot recover. Both charges were refused, and this ruling is here assigned for error.

W. F. GLOVER, for appellant.

SMITH & CORBS, for appellee, cited *Cawthorne v. Cowdrey*, 13 C. B. (N. S.) 406; *Meaher v. Pomeroy*, 49 Ala. 146.

JUDGE, J. — The contract sued on in this case was verbal, and was made on the twenty-first day of December, 1870, for a year's service, to commence on the day following. The question in the case is, whether by its terms it was a contract not to be performed within a year from the making thereof, and therefore void under the statute of frauds.

Section 8 of our Code provides that the word year, when used therein, means a calendar year; and we hold that an agreement for the performance of a year's service means a year to commence on the next day. This construction is in accordance with the ordinary rule for the computation of time which excludes fractions of a day; and it is in harmony, too, with section 14 of the Revised Code, which provides that in computing the time within which any act is required to be done, there must be an exclusion of the first day and an inclusion of the last. *Owen v. Slatter*, 26 Ala. 547.

The court of common pleas of England, in a case almost identical with the present, and under a statute of frauds the same in substance as ours, decided that a contract made on one day for a year's service to commence on the next was not within the statute of frauds. *Cawthorne v. Cowdrey*, 13 Com. Bench Rep. (N. S.) 406.

There was no error in the refusal of the circuit court to give the charges requested, and its judgment is affirmed.

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Little v. Snedecor & Little, Administrators.

Bill in Equity to settle Partnership and to declare a Trust in Lands bought by Deceased Partner in his Lifetime.

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1. *Partnership; real estate purchased with partnership funds, how treated in equity.* — Real estate purchased with partnership funds, for partnership business, is treated in equity as partnership property, without regard to the manner in which it was bought, or to the person to whom the legal title was conveyed.

2. *Same; when heirs of deceased partner declared trustees.* — The heirs of one deceased partner, where the title was in him, will be treated as trustees for the surviving partner. It is immaterial that the trust should be expressed; if it exists and is clearly proved, it will be enforced as other resulting trusts.

3. *Same; bill to settle, and to have a partner's lands decreed partnership assets; appropriate allegations of.* — A bill for account and settlement of partnership affairs, praying that land alleged to have been purchased by one of the partners, &c., be decreed partnership assets, &c., should set forth by appropriate allegations the contract or agreement of partnership, and the agreement and facts concerning the purchase of the land, so as to enable the court to judge whether the partnership was in reality formed, and to see without doubt that the land purchased was to be partnership property.

4. *Equity pleading; repugnancy between bill and exhibits.* — When it is alleged that the copartnership was formed at a given time in a certain year, when each of the partners contributed, as capital stock of the firm, the amounts respectively shown by an exhibit, which does not show any such contributions at the time stated, but consists merely of a statement in figures of various sums of money as having been contributed, by the parties respectively, for a series of years, beginning after the designated year, there is a repugnancy between the allegations and exhibit.

5. *Same; amendments.* — Under our liberal statute of amendments, the chancellor, on sustaining a demurrer, should not dismiss the bill without first allowing an opportunity to amend.

6. *Same; presumptions on appeal.* — On appeal, where it does not appear that any effort was made, by an offer to amend, to avoid dismissal, after sustaining a demurrer, it will be presumed that the complainant did not desire to amend.

APPEAL from Sumpter Chancery Court.

Heard before Hon. A. W. DILLARD.

The appellant filed on the 4th day of October, 1872, a bill in chancery against appellees as administrators of the estate of J. J. Little, deceased, alleging that on the 7th day of October, 1866, appellant and said intestate "entered into copartnership together under the name of Little & Little, as farmers, &c., for the purpose of carrying on the business of farmers and planters on joint account, and upon an equal division of the profits; and they then contributed as capital the amounts respectively, as appears from Exhibit A. thereto attached, to form a capital to start with, and that the partnership continued until it was dissolved by the death of the intestate, on the 13th day of February, 1872." Exhibit A. is as follows: "Amounts contributed by N. Little: in 1867, \$1693²¹; in 1868, \$683²²; in 1869, \$685²¹; in 1870, \$507²²; in 1871, \$511²²; total, \$4081²². Amounts contributed by James J. Little: in 1867, \$2866²¹; in 1868, \$3143²¹; in 1869, \$458²²; in 1870, \$351²²; in 1871, \$1327²²; in 1872, \$201²². Total, \$8351¹¹."

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The bill further avers "that simultaneously with the formation of said copartnership there was purchased the lands appended as Exhibit B. and made a part of this bill, for the purpose hereinafter mentioned." That it was agreed that J. J. Little should pay for the lands, and that he did so and the title thereto was conveyed to him; but when the purchase was made, a written agreement was entered into between J. J. Little and N. Little, that, upon the payment by N. Little to J. J. Little of one half of the purchase-money, the latter should convey the title to "one half interest" in the lands to N. Little. The bill then states that pursuant to the agreement between the parties, complainant took possession of the lands for the purpose of carrying on the operations of the farming copartnership, about the 1st of November, 1866, and continued the sole manager thereof until the death of J. J. Little, on February 13, 1872. That large crops were raised by him on said lands, which were sold by J. J. Little, and the proceeds paid to J. J. Little; that all the books, receipts, &c., of the concern were intrusted to the keeping of J. J. Little, except a small memorandum book belonging to complainant; that defendants, Snedecor and Little, are the administrators of the estate of J. J. Little, deceased, and as such have taken possession of said books and papers, and are proceeding to sell said lands for the payment of the individual debts of the intestate. That a large sum was collected by J. J. Little from the proceeds of the crops over and above all expenses, and that complainant's share in the net proceeds was more than sufficient to pay for complainant's half interest in the lands. An account is prayed of the partnership concerns, and that the tract of land bought be sold for payment of the debts of the partnership, and for general relief. Respondents demurred to the bill, because it is repugnant, contradictory, and inconclusive, and because the partnership contract is alleged too generally; its terms, conditions, and stipulations are not alleged.

The demurrer was sustained and the bill dismissed without prejudice.

CRAWFORD & MOBLEY, for appellant. — The accounts are mutual, complicated, and a discovery is necessary. 7 Ala. 217; 8 Ib. 743. The bill calls for specific performance of intestate's contract, and chancery only can give relief. Brick. Dig. 692-3-4. If there are sufficient substantial allegations, uncertainty does not justify a demurrer. 27 Ala. 461. Joseph J. Little became a trustee for Noah Little's half, and equity will enforce the trust. 23 Ala. 837; 5 Ib. 446. Equity has original jurisdiction to enforce payment of a partnership debt, out

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of a deceased partner's estate. 28 Ala. 629. First head-note in *Hiscock v. George*, 49 N. Y. 97.

SNEDECOR & COCKRELL, and W. G. LITTLE, JR. *contra*. — The bill alleges that the land is partnership property, when the exhibits show that it is not. 7 Ala. 569. The bill is contradictory and repugnant; the allegations of the bill are contradicted by the exhibits; the latter show a different cause of action from that set up in the bill. 21 Ala. 252; 13 Ib. 681.

JUDGE, J. — Real estate purchased by partners for the partnership business, and with partnership funds, becomes partnership property; and it is not material in what manner it is bought, nor in what name it stands. It will make no difference that the title is in the deceased partner alone, for his heirs will be considered trustees for the survivor. Nor is it necessary that the trust should be expressed, for a court of equity will always supply this want, and treat the ownership as a distinct trust, if only the trust exist and is capable of proof and the land be in fact and substance partnership property. This doctrine rests, as has been said, on the broad foundation of a resulting trust. *Parsons on Partnership*, 363-4-5; *Pugh v. Currie*, 5 Ala. 446; *Owens v. Collins & Langworthy*, 23 Ala. 837.

The bill in the present case seems to have been framed with a view to the law as it is above stated, and is not without equity; but it is repugnant in some of its allegations, and we think deficient for the want of others. In the first paragraph it is averred that the copartnership was formed on or about the seventh day of October, 1866, and that each partner at that time contributed as capital stock of the firm the amounts respectively as shown by Exhibit A. to the bill. The exhibit referred to does not show that any such contribution was made by either party at the time as stated, but consists only of a statement, in figures, of various sums of money as having been contributed by the parties respectively, during a series of years commencing in 1867 and ending in 1871. Thus there is a repugnancy between the allegations and the exhibit.

The contract or agreement for the formation of the copartnership, with its terms and conditions, should have been set forth in the bill, so that it might be seen from the facts averred, whether a copartnership was really formed or not. This was not done; nor is it sufficiently shown by the bill that there was such an understanding or agreement between the parties, before the purchase of the land, as that when purchased it should be partnership property; nor is it distinctly shown that it was purchased with partnership funds. It is a matter of doubt too,

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from the allegations of the bill, whether the land, when purchased and paid for, was to be partnership property, or was to be owned by the parties as tenants in common.

The bill, perhaps, might have been perfected in the court below by appropriate amendments; but it does not appear that any effort was made to avoid the dismissal of the bill by having appropriate amendments allowed, and we must presume that the complainant did not desire to amend after the demurrer was sustained. Such presumption is indulged when a demurrer to a bill is sustained for the want of proper parties, and we can see no good reason why it should not obtain when a demurrer is sustained for any defect which can be cured by an amendment. *Singleton v. Gayle*, 8 Porter, 270; *Goodman v. Benham*, 16 Ala. 625; *Andrews v. Hobson's Adm'r*, 23 Ala. 219.

But we think the practice in the chancery court in such case should be, not to dismiss the bill without first allowing an opportunity to amend; such a practice would best comport with the spirit of our liberal statute of amendments.

The decree of the chancery court dismissing the bill without prejudice is affirmed; and the appellant must pay the costs of this court and of the court below.

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Indictment for Murder.

1. *Repeal of statutes; special statutes not repealed by subsequent general statutes.* — A subsequent statute will not repeal a prior act, in the absence of express words of repeal, unless the provisions of the subsequent act are directly antagonistic and repugnant to those of the former. If by any fair construction it is possible for both to have some field of operation, both must stand; especially where the general words of the later statute are the only evidence of the legislative intent to repeal the particular provisions of the former act.

2. *Section 4180 of Revised Code not repealed by the act to amend § 4063 of Rev. Code.* — The act to amend § 4063 of the Rev. Code, approved December 31, 1868 (Acts 1868, p. 550), which requires the officers therein designated to select grand and petit jurors from the list of registered voters on file in the probate judge's office, observing strictly "all qualifications and restrictions in regard to competency and qualification as now provided by law," does not repeal § 4180 of the Rev. Code, which allows a challenge for cause, in a criminal trial, to one summoned as "a juror, and not a resident freeholder or householder, for the preceding year." (BRICKELL, C. J., dissenting.)

3. *Freeholder or householder; renting of land merely for one year does not constitute.* — A person who had merely "rented land for the last twelve months," is not a "freeholder" or "householder," within the meaning of § 4180 of the Revised Code.

4. *Challenge for cause; error in disallowing; when not cured by subsequent allowance of additional challenges.* — Error in disallowing a challenge for cause to a juror, thereon peremptorily challenged by a defendant, whose challenges were not then exhausted, will not be cured by allowing him to exhaust a greater number of peremptory challenges than given by law, it not appearing when the court made known its purpose to allow the extra number of challenges.

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APPEAL from the Circuit Court of Choctaw County.
Tried before Hon. LUTHER R. SMITH.
The facts are set forth in the opinion.

W. F. GLOVER, & COBBS, for appellant.

JOHN W. A. SANFORD, Attorney General, *contra*.

JUDGE, J. — On the trial of this cause, one O. C. Young was drawn and called as a juror, and was asked by the court whether he had been a householder or a freeholder for the past twelve months; the juror answered, "I am not a householder, but have rented land for the past twelve months." The defendant insisted that the juror was incompetent to sit upon his case; but the court ruled that he was a competent juror, to which ruling the defendant excepted and then excused the juror from the panel.

Section 4180 of the Revised Code provides that it is a good ground of challenge by either party, in a case like the present, that the person called as a juror has not been a resident householder or freeholder of the county for the last preceding year; and the first question we shall consider is: Has this section of the Code, or any portion thereof, been repealed by the act of the legislature approved December 31st, 1868? Acts 1868, pp. 550-1.

The act of 1868 is entitled "An act to amend section 4068 of the Revised Code of Alabama," and is as follows: —

"SECTION 1. *Be it enacted by the General Assembly of Alabama*, That section 4068 of the Revised Code of Alabama which reads as follows, to wit: 'The sheriff, judge of probate, and clerk of the circuit or city court, or any two of them, must meet biennially on the first Monday in May, or within thirty days thereafter, at the office of the clerk of the circuit or city court, and select from said list the names of such persons as in their opinions are competent to discharge the duties of grand and petit jurors with honesty, impartiality, and intelligence, and are esteemed in the community for their integrity, fair character, and sound judgment; but no person must be selected who is under twenty-one years of age, or over sixty years of age, or who is an habitual drunkard, or who is afflicted with a permanent disease,' be and the same is hereby amended as follows: The sheriff, judge of probate, and clerk of the circuit or city court, or any two of them, must meet on the first Monday in January, eighteen hundred and sixty-nine, and every year thereafter, at the office of the judge of probate, and select from the list of registered voters, on file in the office of the judge of probate, such persons as in their opinions are compe-

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tent to discharge the duties of grand and petit jurors: *Provided*, that all the qualifications and restrictions with regard to competency and qualification in the selection of jurors, as is now required by the law in this section, shall be strictly observed by said officers."

As will be seen, this act makes no reference whatever to section 4180 of the Code; it simply does what it purports by its caption to do, viz.: amends section 4063 of the Revised Code. If, then, section 4180, or any portion thereof, is repealed by the act, it is a repeal by implication only.

The rule is well settled and universally acknowledged, that the repeal of a statute by implication is not favored; and that the courts will not construe a prior act to be repealed by a subsequent one, in the absence of express words of repeal, unless the provisions of the subsequent act are directly repugnant to the former. But when such repugnancy exists, the latter must prevail, and consequently the former is repealed to the extent that the provisions of the two acts are inconsistent with each other. 2 Brickell's Digest, 463, §§ 44, 45. If, however, it be possible to reconcile them together, — if by fair interpretation they may both stand, — the subsequent statute will not abrogate the former. Sedgwick on Stat. & Con. Law, 105; Smith on Stat. & Con. Law, 879.

It becomes then a material question whether there is such a repugnancy between section 4180 of the Code, or any portion thereof, and the act of 1868, as that the latter abrogates the former.

Although both statutes relate to some extent, to the same subject matter (the selection and qualification of jurors), yet each has a separate and distinct field of operation. One provides for a general annual selection of persons to serve as grand and petit jurors; the other prescribes the grounds of challenges for cause of jurors drawn for the trial of criminal causes only. In other words, one is general in its provisions; the other relates to a special class of cases; and the well recognized rule is, that where the intention of the legislature is not apparent to that purpose, the general words of another and later statute shall not repeal the particular provisions of a former one; the maxim of the law being, "*Generalia specialibus non derogant.*" *Magruder v. The State*, 40 Ala. 349.

But if it should be said that a conflict may ensue in the selection of a jury to try a criminal cause, for the reason that the act of 1868 does not require the jurors selected under its provisions to be householders or freeholders, when section 4180 of the Code makes the absence of such qualification a ground of challenge for cause, we answer that the act of 1868 does not *prohibit* the selection of householders or freeholders for jury

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service ; on the contrary it provides, as we have seen, that the officers in executing its provisions, shall "*strictly*" observe all the "qualifications and restrictions, with regard to competency and qualification" of the persons selected, as is required by section 4063 of the Code. These "qualifications and restrictions" are, in part, that the persons selected must be such as in the opinion of the officers making the selection are "competent to discharge the duties of grand and petit jurors with *honesty, impartiality, and intelligence, and are esteemed in the community for their integrity, fair character, and sound judgment.*" Now, if these requirements are obeyed, it will be next to impossible for the requisite number of grand and petit jurors to be selected in any county of the State, for service at any term of court, without the much larger proportion thereof being householders or freeholders. If these requirements are disregarded by the officers of the law, the greater is the reason for the existence and enforcement of section 4180 of the Code ; as one provision thereof protects persons whose lives and liberties are involved in a criminal prosecution, to the extent of allowing them to demand that their triers shall be householders or freeholders.

Instead then of there being irreconcilable conflict between the act of 1868 and section 4180 of the Code, or any part thereof, we hold that each can have harmonious action in its appropriate sphere ; to hold otherwise would, in our opinion, be to disregard some of the wise and long established rules for the construction of statutes.

It follows from what we have said that the juror, O. C. Young, was obnoxious to the challenge of the defendant for cause, and that the court erred in disallowing it ; that the juror had rented land for the preceding twelve months did not make him a freeholder.

The record shows that the defendant peremptorily challenged this juror, after he had been put upon defendant by the court, and that before the panel was exhausted, he was allowed by the court *twenty-five* peremptory challenges, and also allowed to challenge some persons summoned from the bystanders, to complete the jury. Do these facts clearly show that the error of the court, was error without injury ?

To procure the reversal of a judgment of conviction for an error in point of law, it is not required that the defendant should show that he was actually injured by it. The rule in such a case is, that the appellate court will presume injury unless the record clearly shows, affirmatively, that none could have been sustained. Such is the rule in both civil and criminal cases (1 Brickell's Dig. 780, §§ 100-106) ; but the rule is more rigidly observed, if possible, in criminal than in civil cases, — especially in criminal cases of serious import. In

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illustration of the correctness of this assertion, we refer to several cases decided by this court. In the case of *The State v. Hughes* (1 Ala. 655), the judgment-entry recited that the jury were selected, tried, and sworn, and that thereupon the defendant was arraigned and pleaded not guilty; and the judgment of conviction was reversed because the plea of the prisoner should have preceded the selection and swearing of the jury. In the case of *Parsons v. The State* (22 Ala. 50), the judgment of conviction was reversed, because the presiding judge discharged two of the jurors on account of sickness in their families, without the consent of the defendant, before the day appointed for his trial, and after the list of jurors summoned for his trial had been served upon him. These and other cases of a similar character decided by this court, show that the law is mild and merciful in its intendments towards those who are the objects of punishment.

That the defendant's peremptory challenges were not exhausted when the court erroneously overruled his challenge for cause, and that the defendant was afterwards allowed more than twenty-one peremptory challenges, cannot cure the error of the court complained of, nor show that it was error without injury. The defendant could not have known that the court as a matter of grace, and contrary to law, would have allowed him extra challenges. It was decided by this court in *Birdsong v. The State* (47 Ala. 68), PECK, C. J., delivering the opinion of the court, that if a juror is challenged for cause on a good ground, and the challenge is disallowed, and the juror is put upon the defendant, and he excepts to the ruling of the court, and then challenges the juror peremptorily, the defendant is entitled to the benefit of the exception, although his peremptory challenges be not exhausted before the jury is completed. And this identical question was made and decided the same way in the following cases: *Lithgow's case*, 2 Virginia Cases, 297; *Sprouce v. The Commonwealth*, Ib. 275; *Dowdy v. The Commonwealth*, 9 Grattan, 727; *The People v. Bodine*, 1 Denio, 282. In the last mentioned case the supreme court of New York says: "The court certainly would not be allowed to disregard a challenge for cause, and turn the party making it over to his peremptory challenges, nor can the fact that the party still has peremptory challenges at his command deprive him of any redress which the law would otherwise give for a violation of his right."

We cannot see that the defendant's case was not influenced prejudicially by the erroneous action of the court, complained of; and in the language of CHILTON, J., in *Flanagan v. The State* (19 Ala. 550), "in cases of this magnitude, involving the liberty of the citizen, the court will not be astute in speculat-

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ing upon the chances of injury to the accused, in order to sustain a conviction effected under such circumstances."

For the error we have named, let the judgment of the court below be reversed and the cause remanded. The appropriate order will be made requiring the warden of the penitentiary to deliver the defendant to the sheriff of Chocktaw county and requiring the sheriff to apply for and receive him, and retain him in custody, until he is discharged by due course of law.

MANNING, J. — I regret very much that we do not all agree in this case. The rule of interpretation of statutes involved in it is one not only of great importance, but in the frequency, nowadays, of legislative enactments, is of greater importance than formerly. Moreover, it is well defined, easy of application, and universally approved by judicial tribunals. The chief justice expresses in his opinion approbation of this rule.

The act of 1868 professes in terms to amend only section 4063 of the Revised Code. The effect of it, nevertheless, is to supersede the preceding section 4062. Thenceforth it is made the duty of the officers mentioned in the act, instead of selecting jurors from a list biennially obtained by the sheriff of the householders and freeholders of the county, to select them from the list of registered voters.

The act provides, however, that in making this selection, "all the qualifications and restrictions with regard to competency and qualification in the selection of jurors as is now required by law in this section, shall be strictly observed by said officers." That is, the law is not to be understood as abrogating those important qualifications and restrictions. The effect of this act, in the opinion of the chief justice, is to repeal section 4180 of the Code also, which secures to defendants in criminal trials the right to be tried by a jury of householders or freeholders. In my opinion, there is no such repugnance between the statutes as will prevent them from standing together.

A principal reason leading the chief justice to this conclusion is, that if these statutes are both allowed to have operation, then citizens who would be competent to constitute a grand jury, or to try civil causes, would not be competent to try a person under indictment for criminal offences. If that be the result of these statutes, it was competent for the legislature so to provide. So long as that body does not transcend its constitutional powers, its *sic volo*, *sic jubeo*, stands as an all sufficient reason for its enactments.

If, however, the inharmony referred to be considered a very serious matter, it can be avoided without any disregard of the

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rule of interpretation to which we refer. The act of 1868 is *in pari materia* with several provisions of the Code, among them section 4180. And while it provides that the officers shall observe, in their selection of jurors, all the qualifications and restrictions of the section repealed by it, it does not inhibit them from observing the other provisions of the law on the same subject. And it seems to me it is much better to hold that among other qualifications, which they must regard, is that the jurors selected shall be householders or freeholders also. This construction is much to be preferred to the setting aside of a cardinal rule in the construction of statutes, or allowing it to be obscured by refined and subtle distinctions.

If we are to indulge in conjectures as to what was the policy of the legislature in enacting the statute of 1868, and then by judicial construction to carry out that policy, (it seems to me,) it is more reasonable to hold that the purpose of the legislature was chiefly to provide that none but those who as registered voters had taken the stringent oath prescribed by the Constitution of 1867-8, and were therefore sworn to support it, and who were otherwise qualified, should serve as jurors, — than to hold that it intended to abolish qualifications which are distinctly prescribed by section 4180, without expressly doing so, or doing so by an act which is so repugnant to that section that they cannot stand together.

Upon the other point in the case: Although the record shows that several more than the legal number of peremptory challenges were allowed to defendant: This was a matter of grace; and it does not appear that he was informed it would be done before he had exhausted his legal number, — at which time, he may have accepted a juror whom he desired to reject, under the apprehension that a more objectionable one would otherwise be forced upon him.

BRICKELL, C. J. (dissenting). — The repeal of statutes by implication is not favored, and when a discrepancy exists between a former and a later statute, such exposition of them will be made that they can stand together if practicable. If there is a real inconsistency, or repugnancy, the former statute must yield to the later. When the two statutes are parts of a body of statutes referring to a common subject matter, and construing them together, so that both can stand, will introduce inconsistency in the operation of the whole, the later statute should be deemed a repeal of the former, so that each part can be justly adapted to every other part, and the whole operate harmoniously.

The manifest intent of the amendatory act of 1868, is to remove household or freehold as a qualification of a juror, substituting in its place registration as a voter. All statutes re-

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lating to juries and jurors, are *in pari materia*, and should be so construed as to accomplish this clear legislative intent.

The effect of the decision of the court is, to create a distinction between the qualifications of grand jurors, and petit jurors, and petit jurors in civil and in criminal cases, unknown hitherto in our laws, and unknown to the common law. Heretofore, at common law, and under our statutes, whoever was competent as a grand juror, was competent as a petit juror, in any case civil or criminal. Of course I refer to general competency, and not to competency as dependent on bias or interest in a particular case. When the question is of general competency — as, whether the person is under or above a particular age, or a householder or freeholder, or alien or citizen, — if he was competent as a grand juror, he was competent as a petit juror, in a civil, or in a criminal case. Under the opinion of the court, a registered voter, though not a householder or a freeholder, may as a grand juror make a presentment for murder, or any other criminal offence; and yet is not competent to sit as a petit juror, and render a verdict on any such accusation, though he is not a competent petit juror in all civil cases. Such an inconsistency in the operation of statutes, should not be the result of construction, but should depend on clear and unambiguous language, leaving no room for construction. When such an inconsistency arises from the operation of a former and a later statute, then, to avoid it, the later is held the repeal of the former.

Another result of the decision is, that the officers charged with the duty of selecting jurors, are compelled to select from the lists of registered voters, and are vested with a large discretion, in the discharge of this duty, among other reasons, to avoid the drawing and summoning of persons whom the court may *ex mero motu* exclude; or who are subject to exclusion on a challenge for cause. When they find a registered voter, of the requisite mental and moral qualifications, not above the prescribed age, they cannot refuse to select him because he is not a householder or a freeholder. They select him, and he is subsequently drawn and summoned; yet when called to discharge the highest duty of a juror's trust, he is excluded, as subject to challenge for cause, not because of his unfitness in the particular cause, but because of his incompetency in all such cases. The officers of the law are thus compelled to the vanity of selecting, drawing, and summoning, an incompetent juror.

In construing all general statutes like the amendatory act of 1868, they should be read in the light of the prevailing public policy. The governmental policy, state and federal, as indicated by legislation and constitutional provision, was the en-

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largement of citizenship, and rendering citizenship the standard of right and privilege, and the test of duty and responsibility. That to this policy the statutes prescribing the qualifications of jurors should be made to conform, this statute removed household or freehold as a qualification, and substituted registration as a voter. The juror objected to, though not a householder or a freeholder, if a registered voter (and that does not appear to have been questioned), was competent, and the court did not err in so determining. I cannot, therefore, concur in the judgment for reversal.

Dunlap v. Newman, et al.

Motion to compel Election between Suit at Law and in Equity.

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1. *Judgments; control of court over, after adjournment of term.* — This court has no power, at a subsequent term, to entertain a motion to dismiss an appeal upon the same grounds of a motion which had been overruled at a former term.

2. *Election between suits at law and in equity; not compelled before answer.* — It is error to compel the complainant to elect between an action at law, and the prosecution of his suit in chancery, before he has had the benefit of defendant's answer.

APPEAL from Clark Chancery Court.
Heard before Hon. A. W. DILLARD.

The bill in this case is set forth, in the report of the former appeal (47 Ala. 429). While said appeal was pending in this court, letters of administration were granted on the estate of Thomas Borroughs, and a suit at law was commenced against said administrator by complainant, on the same cause of action sought to be enforced by his bill. When the suit on said former appeal was remanded to the chancery court below, and before any answer was filed, the defendants submitted a motion under Rule 108 of Chancery Practice (R. C. p. 840), to compel complainant to elect in which cause he would proceed. In response to this motion the court decreed that "complainant, Joseph F. Dunlap, do, within sixty days from the date hereof, file with the register of this court his written election as to whether he will proceed in this, or the court of law, to enforce the collection of the note sued on in both forums, and in default of said written election being filed pursuant to this order, said complainant's bill shall stand dismissed out of this court." The record does not show that any written election was filed, nor that any other decree was rendered in the case.

At the June term, 1874, of this court, the appeal in this case was, on motion, dismissed; afterwards, but during the same term, a rehearing was granted, and the motion to dismiss

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denied. At the present term the cause was submitted on its merits, together with a motion to dismiss the appeal, based upon the identical grounds of the former motion.

Appellant assigns as error : 1. The court erred in requiring appellant to elect in which court he would proceed ; 2. The court erred in dismissing complainant's bill ; 3. The court ought to have granted the relief prayed by the bill.

E. S. DARGAN, for appellant.

MORGAN, BRAGG & THORINGTON, *contra*.

BRICKELL, C. J. — A motion to dismiss this appeal on the identical grounds on which the present motion is based was overruled at the last term of this court. The judgment then rendered is now conclusive, and we are without power to revise or to vacate it. *Vandyke v. State*, 22 Ala. 57. The present motion must therefore be refused.

The practice of compelling in equity an election between an action at common law and a bill in chancery, founded on the same claim or demand, is of great antiquity. It is thus stated in Lord Bacon's 18th Ordinance : "Double vexation is not to be admitted, but if the party sue for the same cause at common law, and in chancery, he is to have a day given to make his election where he will proceed, or in default of such election to be dismissed." 1 Smith's Ch. Pr. 561. It is the court of chancery alone that can compel the election ; a court of law has no such power. *P. & M. Bank v. Willis*, 5 Ala. 770 ; *P. & M. Bank v. Walker*, 7 Ala. 926 ; *Kemp & Buckey v. Coxe*, 14 Ala. 614. Before a court of equity will compel an election, the defendant must file a sufficient answer ; and the time for excepting to it must have expired. 1 Smith's Ch. Pr. 561 ; Story's Eq. Pl. § 742 ; 1 Daniel's Ch. Pr. 634.

The matter became the subject of a special rule of chancery practice, adopted by this court at the July term, 1830, in the following terms : "When a suit at law and a bill in chancery are instituted for the same claim or demand, the defendant, on suggestion supported by affidavit, may move the court to inspect the records ; and if it appear the two suits are for one and the same cause of action, it shall be ordered that the plaintiff elect in which he will proceed, and that he dismiss the other." Aik. Dig. 458, Rule 31. This rule remained until the June term, 1854, of this court, when the present rules of chancery practice were adopted. The 108th of the present rules reads : "Where a suit at law and a bill in chancery are instituted for the same claim, the opposite party, on suggestion supported by affidavit, may move the court in term time, or the chancellor

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in vacation, to inspect the records; and if it appears that the two suits are for one and the same cause of action, it shall be ordered that the plaintiff or claimant elect in which he will proceed, and that he dismiss the other." R. C. p. 840. The material difference between the present and former rule is, that now the chancellor may hear and determine the motion for an election in vacation, or in term time, while the former rule would have required it to be heard in term time only. Neither rule varies materially from the practice prevailing in the English court of chancery, and which, in the absence of a special rule, would have prevailed here.

In *Houston v. Sadler* (4 S. & P. 130), conforming to the well established rule of chancery practice, after the adoption of the first special rule on this subject, this court declared, a complainant ought not to be compelled to elect until after the coming in of the defendant's answer; that he was entitled to the benefit of all the information the answer could supply, to enable him to make an intelligent election. The reason for not compelling an election before answer is as cogent under the present, as under the former rule, or as under the general rules of chancery practice. It is founded on the principle on which courts of equity proceed whenever a party must elect between conflicting or inconsistent rights, that he must have full knowledge of all the facts and circumstances necessary to a discriminating and judicious choice. This he cannot have until the defendants have fully answered. The answers may be evidence for him so complete, that he would prefer the suit in equity to the suit at law, or in many other ways determine his choice. Without now inquiring whether the suit at law and the suit in equity are of the character requiring the complainant to elect between them, that question not having been argued, as answers had not been filed, we must reverse and annul the order of the chancellor requiring an election, and remand the cause.

M. Lansburg & Co. v. Phillip Cohen.

Assumpsit for Goods and Merchandise sold.

Complaint; amendment of.—A complaint by two persons, suing as late partners, trading under a firm name, on an account contracted with them, may be amended by striking out one plaintiff and declaring on the indebtedness as a cause of action in favor of the remaining plaintiff alone.

APPEAL from Dallas Circuit Court.

Tried before Hon. M. J. SAFFOLD.

The facts are sufficiently stated in the opinion.

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W. C. WARD, for appellant, cited Rev. Code, § 2809; *Laird v. Moore*, 27 Ala. 326; *Godbold v. Blair & Co.* 27 Ala. 592; *Jemison v. Smith*, 37 Ala. 185; *Harris v. Plant*, 31 Ala. 639; *Humphries v. Dawson*, 38 Ala. 203; *Pool v. Deavers*, 30 Ala. 672.

JOHNSON & NELSON, *contra*. — If appellant's position be correct, why cannot a suit by an executor, administrator, or trustee be amended so as to make it the suit of the individual? 32 Ala. 676; 30 Ala. 636. Why cannot an entire change of parties be made? *Laird v. Moore*, 27 Ala. 326; *Pickens v. Oliver*, 32 Ala. 676. Why cannot a suit by a guardian as such, be amended so as to make it the suit of the ward? *Fowlkes v. M. & C. R. R.* 38 Ala. 310. Why cannot a suit against several on a joint contract, where all have been served, be amended by striking out one of the parties served? 2 Brick. Dig. p. 370, § 136. The true rule seems to be that the plaintiff may narrow or limit his right to recover, by amending, but can never enlarge it. *Taylor's Executrix v. Taylor*, 43 Ala. 650.

A partnership is an *entity*; it is, as it were, the individual or body who brings the suit; it must act collectively, and its action is not the joint action of the members comprising the firm, but the action of the unity constituting the firm; it is the motion, — the *deed* of the firm; hence it has been held that when the suit is brought by a copartnership, you may bring in any number of persons who are members of the firm. *Godbold v. Blair & Co.* 27 Ala. But we believe it is just as proper to amend a suit brought by the president and directors of a corporation, so as to make it a suit in the name of the president, as to change the suit of a partnership to the suit of one of its members.

JUDGE, J. — This was a suit upon the common counts, and it was commenced in the name of M. Lansburg and Charles Fleischmann as "late partners trading under the firm name and style of Lansburg & Co."

During the progress of the trial, it was disclosed by the evidence that the indebtedness which was the foundation of the action was due to Lansburg alone, and that no such partnership as that ascribed in the complaint had ever existed. Thereupon a motion was made by the counsel of Lansburg, for leave to amend the complaint by striking out the name of Fleischmann, as a party plaintiff, and further so to amend it, as to show that the right of action was in Lansburg alone as sole plaintiff.

The court refused to allow the amendments to be made.

The effect of the proposed amendments, if they had been

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allowed, would not have been to substitute an entirely new cause of action, nor to have made an entire change of parties plaintiff. The cause of action would have remained the same as it originally was, although shown to be due in a different right, and one of the original plaintiffs would still have remained a party plaintiff on the record.

Section 2809 of the Revised Code provides that the courts respectively must, whilst the cause is pending, "permit the amendment of the complaint by striking out or adding new parties plaintiff, or by striking out and adding new parties defendant, upon such terms and conditions as the justice of the case may require. If an amendment of this character should operate as a surprise to the adverse party, the "justice of the case" might require the court to grant a continuance of the cause.

The court erred in refusing to permit the proposed amendment to be made, and the judgment of nonsuit must be set aside and the cause remanded.

Wesley v. The State.

Indictment for Murder.

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1. *Record ; conclusiveness of recitals of.* — The recital in the record that "defendant, in open court, acknowledges service of a copy of the indictment and list of jurors, one entire day before the day set for trial," &c., concludes him from disputing such service, and dispenses with all further inquiry, or other recital as to it, even if such service was required to appear affirmatively of record, to uphold the conviction.

2. *Indictment ; presentation of, and filing in court, how shown.* — An indictment indorsed "a true bill," and signed by the foreman, and also indorsed and signed by the clerk "filed in open court by the foreman of the grand jury, in the presence of fourteen other members of the grand jury," on a named day of the term at which the indictment was found, cannot be abated on plea that it was not presented to, and filed in court, in the manner prescribed by law. Such an indictment shows a literal compliance with the statute.

3. *Res gestæ ; admissibility of declarations of deceased identifying prisoner, as part of res gestæ.* — The defendant, named Jake Wesley, being on trial for murder, it is competent to prove, as part of the *res gestæ*, that deceased, having been aroused before day by a noise at his chicken house, and going out to see what occasioned it, was shortly afterwards heard to exclaim, "Jake, what are you doing here?" when it appears that, on returning in a short time and dressing himself, deceased again went out and was absent five or six minutes, during which time witness heard the reports of two shots, and saw deceased return wounded.

4. *Venue ; failure to prove, must be excepted to.* — In the absence of any exception whatever in the court below, a conviction will not be reversed, on appeal, for the mere failure of the record to show proof of venue.

5. *Witness ; examination of ; discretion of judge as to, must be unwisely exercised, to work reversal.* — The time, manner, and length, to which the examination of witnesses can be protracted, rests very greatly in the discretion of the presiding judge; and a party complaining of a ruling terminating the repeated plying of witnesses with the same questions, to which the same answers had been made, must show that the discretion has been unwisely exercised.

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APPEAL from the City Court of Montgomery.

Heard before Hon. JOHN A. Minnis.

The defendant, Jake Wesley, was indicted for the murder of Ben. Jarratt. It does not appear in the bill of exceptions that the defendant was served with a copy of the indictment, together with a list of all the jurors summoned in the cause, but the judgment entry recites that defendant acknowledged the delivery thereof to him one entire day before the trial. Defendant pleaded in abatement to the indictment, that it had not been presented to, and filed in court as required by the statute. The indictment contained the indorsements mentioned in the opinion of the court, and, on demurrer, the plea was held bad by the court below. Thereupon issue was joined on the plea of not guilty.

In drawing the jury, the name of Alex. *Jones* was drawn; the defendant objected that no such name was on the list furnished him, and that the name on his list, corresponding with the number of the name drawn, was Alex. *James*. The court ordered that name to be laid aside, and directed a new juror to be summoned instead. After the name of the new juror (Samuel Westcott) had been placed in the box, he applied to the court to be excused, but the court declined to hear his excuse until his name was drawn, and defendant excepted thereto; when said Westcott's name was drawn, he was challenged for cause.

Another juror (Brassell) was drawn, and peremptorily challenged by defendant, but before the next juror was drawn, defendant announced that the name of *Brassell* was not on the list served on him; that the name on his list, corresponding with the number drawn, was "*Bassell*." "The court asked the defendant and his counsel what they requested? They refused to make any request, or indicate any course, but stated they would take notice of any irregularities, and except." The court thereupon directed that the defendant should not be charged with this challenge.

The name of S. A. *Dreher* was also drawn, and he was challenged for cause; the defendant announced that he had no such name on his list, but that, instead, he had the name of "*Drehler*." No other juror was summoned in his place, and defendant excepted.

When the panel of fifty jurors, including the regular panel for the week, was exhausted, eleven jurors had been accepted; thirteen peremptorily challenged by the defendant, eight by the State, and the remainder were challenged for cause. Two more jurors were then summoned and drawn; one of these was challenged for cause and the other was accepted.

During the trial the wife of the deceased testified that on

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the Thursday night before the death of deceased, she was awakened by her husband's jumping out of bed and exclaiming that some one was after the chickens ; that he ran out of the door towards the chicken house, and she heard him exclaim when out there, "Jake, what are you doing here?" but she heard no reply. To that portion of the testimony defendant objected, but the court overruled the objection and admitted it to the jury, and defendant excepted. The witness further testified that deceased then returned to the house, dressed himself, and went out again. After he had been out about five or six minutes, she heard two reports of a gun, away from the chicken house, and soon thereafter deceased returned to the house wounded.

The record nowhere shows that the venue was proved, or that any objection was taken by the defendant, or that the question was in any way raised in the court below.

The counsel for defendant, on cross examination of a witness, having repeatedly asked him as to his having seen defendant near the house of deceased on the evening before the night deceased was shot, the court interrupted him by using the following language: "The witness has answered several times that he saw defendant near Ben's (deceased's) house on the Thursday afternoon before the shooting, and I think that is sufficient on this point;" at the same time saying that if counsel of defendant was not satisfied he might proceed. Defendant excepted to the language used by the court, as tending to influence the jury against him. Afterwards, when the counsel for defendant was repeatedly asking and pressing a question upon another witness, the court said: "How can the witness answer the question differently from what he has done?" and no further answer was made by the witness, and defendant excepted to this language used by the court.

There was other testimony in the cause, but not bearing on the points decided here. The defendant was convicted and sentenced to ten years' imprisonment in the penitentiary. He appealed and assigned as error: 1st. The failure of the State to *prove* that defendant was served with a copy of the indictment and a list of the jurors one entire day before the trial; 2d. Sustaining the demurrer to defendant's plea in abatement; 3d. The action of the court in empanelling the jury; 4th. Admitting testimony of deceased's declaration, "Jake, what are you doing here?" 5th. The language used by the court in reference to defendant's cross-examination of the witnesses, and, 6th. The failure to prove venue in the case.

JNO. GINDRAT WINTER, for appellant. — The record fails to show that a copy of the indictment and a list of the jurors,
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were served on the prisoner one entire day before the trial. Rev. Code, § 4171; *Morgan v. The State*, 48 Ala. 65.

The acknowledgment of the prisoner of delivery to him of a copy of the indictment and a list of the jurors in his case is not sufficient; it should be *proved*. The demurrer should have been overruled; nothing in the record shows that the indictment was presented as required by § 4148 of Rev. Code. In 35 Ala. 421, it is held that an indictment indorsed "A true bill," signed by the foreman, and indorsed "filed," and signed by the clerk, is sufficient, *primâ facie*; but we think that the authorities cited in that case, holding a contrary view, are more consistent with reason.

Generally, hearsay evidence is inadmissible. Roscoe Crim. Ev. 22. The exclamation by deceased, "Jake, what are you doing here?" as testified to, is not embraced in any of the exceptions to the general rule. *McAdams v. Beard*, 34 Ala. 478. "The acts of another, in the absence of the defendant, are, *primâ facie*, inadmissible against defendant." *Hall v. The State*, in MS., June term, 1874. There was no evidence that defendant was at the chicken house, and therefore no predicate was laid to admit the exclamation of deceased, as coming within that class of hearsay declarations which would, under the circumstances, naturally call forth a reply; and yet, this evidence was admitted for the purpose of showing the presence of the accused. Nor was the declaration admissible as a part of the *res gestæ*; the shooting occurred several minutes afterwards, at a different place, and after deceased had returned to his room, dressed himself, and had gone out again. It was certainly too remote and disconnected. Under the circumstances, it being at night, and doubtless made under excitement, the exclamation was but the expression of an opinion, or, perhaps, a bare suspicion. "The exclamation of the deceased, made antecedent to the stroke, cannot be received." *State v. Ridgely*, 2 Har. & McHen. 120; *Gray v. Goodrich*, 7 Johns. 95. And in the case of *Joe Johnston v. The State* (47 Ala. 9), the declarations of the deceased, while lying on the ground, and immediately after he was shot, were admitted solely as dying declarations.

Proof of venue being a jurisdictional fact, the record must affirmatively show that some *evidence* was introduced, at least tending to show the venue, where the bill of exceptions (as in this case) purports to set out all the evidence in the case. *Frank v. The State*, 40 Ala. 9; *Ewell v. The State*, 6 Yerg. 364.

The remarks of the court in relation to the examination of the witnesses were improper; they interfered with the right to a full cross-examination, and tended to bias the minds of the jury. *Stephens v. The State*, 47 Ala. 696; *Sims v. The State*, 43 Ala. 33; *Hare v. Little*, 28 Ala. 236.

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JOHN W. A. SANFORD, Attorney General, *contra*. — The indictment was regularly presented and filed. Rev. Code, § 4148; *Mose v. The State*, 85 Ala. 421.

The objections raised in empanelling the jury are of no avail to defendant; admitting that the court erred, the errors were waived by the conduct of the defendant. *Ex parte Hall*, 47 Ala. 675.

The question of the deceased, "Jake, what are you doing here?" is a part of the *res gestæ*, and defendant's objection was properly overruled.

As to the conduct of the court, in the examination of the witnesses, see *Lyman v. The State*, 45 Ala. 78; *Grady v. The State*, 11 Ga. 253.

If the court erred in failing to require the venue to be proved, the defendant is not in a condition to assign the error here, because he did not except to it in the court below. See *Frank v. The State*, 40 Ala. 1.

BRICKELL, C. J. — The appellant was indicted for murder. The record discloses that he acknowledged in open court that a copy of the indictment, and a list of the jurors summoned for his trial, had been duly served on him one entire day before the day appointed for trial. This acknowledgment it is now insisted is not sufficient evidence of the fact of such service; that it should be made to appear from other evidence. If it could be conceded essential to the validity of a conviction for felony, which may be punished capitally, that it should appear affirmatively from the record, that a copy of the indictment and a list of the jurors had been served on the defendant, one entire day before his trial, we are at a loss to conceive any higher evidence of this fact than the admission of it in open court by the defendant. Such an admission dispensed with all inquiry into the fact, and is as against the defendant conclusive evidence of it.

The appellant pleaded in abatement to the indictment, that it had not been presented to and filed in the court as required by the statute. The indictment was indorsed "a true bill," and the indorsement signed by the foreman of the grand jury. It was also indorsed "Filed in open court, by the foreman of the grand jury, in presence of fourteen other members of the grand jury this the 17th day of April, A. D. 1874," and the indorsement is signed by the clerk. This is a literal compliance with the statute. R. C. § 4148. The only evidence of the authenticity of an indictment which is required under our law is the indorsement of the foreman of the grand jury. The indorsement the clerk is required to make may be made at any time, while the cause is *in fieri*. *Clarkson v. State*, 3

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Ala. 378; *Mose v. State*, 35 Ala. 421. Independent of this consideration, the plea in abatement was an admission of the genuineness of the indictment. The plea could not be interposed except to a genuine indictment. A spurious paper, attempted to be foisted on the court, is not met by a plea, but by a motion to strike from the files, or other appropriate motion, on the hearing of which evidence as to its character may be received. *Clarkson v. State*, *supra*. There was no error in sustaining the demurrer to the plea in abatement.

In the empanelling of the jury, no errors prejudicial to the appellant were committed. Acts or declarations of persons not parties, or of one party in the absence of another, are often received in evidence as parts of the *res gestæ*. It is perhaps impossible to lay down a general rule as to the acts or declarations which will be received as forming parts of the *res gestæ*. Each case is dependent in a great degree on its peculiar facts and circumstances. Such acts or declarations as are thus received, must have been done or made at the time of the occurrence of the main fact, must have a tendency to elucidate it, and must so harmonize with it as obviously to constitute one transaction. It is not essential that they should be precisely concurrent in point of time with the main fact; if they spring out of the transaction; if they elucidate it; if they are voluntary and spontaneous, and if they are made at a time so near to it, as reasonably to preclude the idea of deliberate design, they are regarded as contemporaneous with the main fact. Starkie on Ev. 86 (Sharswood's ed.); *Gandy v. Humphries*, 35 Ala. 621; 1 Green. Ev. § 108. The cry of the mob accompanying Lord George Gordon was received in evidence as part of the *res gestæ*, and showing the character of the principal fact, alleged to be an overt act of treason. The exclamation of the deceased, "Jake, what are you doing here?" was coincident in point of time with the main fact, — the violence producing his death. From the moment he was aroused from sleep by the noise on his premises until he was shot, all the facts in evidence were but parts of a continuous transaction. The exclamation, sprung from the very character of the facts — was natural, voluntary, and spontaneous, and was not the result of design. Tested by the strictest, narrowest rules applied, in determining when an act or declaration can be received as forming part of the *res gestæ*, this exclamation has all the elements of admissibility.

There are numerous decisions of this court, affirming that a charge to the jury authorizing a conviction, without proof of the venue, is erroneous. So if no exception is reserved to the charges which may have been given, or no charge is requested asserting that a want of evidence of venue is fatal to a convic-

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tion, but an exception is reserved to the conviction and sentence. These decisions will be followed as correct expositions of the law. They will not be extended to the reversal of a judgment of conviction, in the absence of all exception in the primary court, because of a failure to make proof of venue. No exception being reserved, the accused must be deemed to have waived evidence of venue. So far as the jurisdiction of the court is dependent on the venue, the original statement in the indictment, "State of Alabama, Montgomery county," is equivalent to an averment that the offence was committed within the body of that county, and authorizing evidence that such was the fact. *Noles v. State*, 24 Ala. 672.

The time, manner, and the length to which the examination of witnesses can be protracted, "lies chiefly in the discretion of the judge before whom the cause is tried, it being from its very nature susceptible of but few positive and stringent rules." 1 Green. Ev. § 431; *Gayle v. Bishop*, 14 Ala. 552; *Ashley v. Hopper*, 15 Ala. 457. We cannot discover that the judge of the city court did not wisely exercise this discretion in terminating the repeated plying of the witnesses with the same questions to which the same answers had been made.

There is no error in the record, and the judgment is affirmed.

Jordan v. The State.

Indictment for Countersigning Paper to circulate as Money.

1. *Written instrument; preliminary proof of.* — Where an instrument is not admissible without proof of its genuineness, preliminary proof made before the judge to authorize its introduction does not relieve the party offering it from proving its execution to the jury on the trial.

2. *Countersigning paper, &c.; erroneous charge as to proof of.* — On a prosecution under § 3643 of the Rev. Code, "for countersigning a paper," &c., "issued without authority of law for purposes of money, or for general circulation," a charge that the defendant could not be convicted "unless there was proof by an eye-witness to the signature, or proof that defendant admitted the signature to be his, or that the signature was in his handwriting," is erroneous.

3. *Charge; what, erroneous.* — A charge, based upon all the evidence which withdraws from the consideration of the jury a material element of the offence, should be refused.

4. *Same.* — On the trial of an indictment under § 3643 of the Revised Code, it is error for the court, in its charge to the jury, to refer to the action of the general assembly in refusing to pass a bill, allowing a railroad corporation to issue change bills.

APPEAL from Elmore Circuit Court.

Tried before Hon. JAMES Q. SMITH.

The appellant, Jordan, was indicted under § 3643 of the Revised Code of Alabama, for countersigning a paper "for the purposes of money, or for general circulation, without authority

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of law." The indictment contained a copy of the paper charged to have been countersigned, which was in the following words and figures:—

“ Tallassee Manufacturing Co. Store.

Good for

(15) Fifteen Cents, (15)

in Merchandise.

On the book,

W. O. Norrell.

W. M. Jordan, Ag't.”

On the trial the proof showed that the original paper charged to have been so countersigned was lost, but that the copy thereof, as set forth in the indictment, was an exact copy. Upon this showing, and without any proof that the signature to the original paper, purporting to be defendant's signature, was genuine, the court permitted said copy to be read to the jury, and defendant excepted. The testimony showed that the defendant was in the employ of the Tallassee Manufacturing Co., located in Elmore county, and as such employee, he, from time to time, delivered bills of the above description, but varying in amounts from ten cents to ten dollars, to the operatives of said company, to be used by them in trading at the store belonging to said company; which bills were charged up to said employees, respectively. It was also proved that said arrangement was a matter of convenience to said company in trading with its operatives and paying them off; that other persons besides said operatives used said bills in trading at said store, but that said company gave instructions that said bills were only to be used by its employees, in trading at said store.

In its charge to the jury, the court stated that “ It was a matter included in the public proceedings of the last legislature of this State, that the Mobile and Ohio Railroad Company applied for an act to authorize that company to issue such papers, for the convenience of the company in making settlements with operatives, but that such authority was refused.” To this statement the defendant excepted.

Defendant asked the court to give the following written charges to the jury: “ 1st. That, in order to establish the execution of the original paper, a copy of which purports to be in the indictment, it must be proved by some person who saw Mr. Jordan, the defendant, sign it; or it must be proven that he admitted that he signed it; or it must be proven that the indorsement on the original was in the defendant's handwriting.

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2. That if it be proven that the paper, a copy of which is in the indictment, was countersigned by the defendant, still the defendant cannot be found guilty, unless it is further proven to the satisfaction of the jury, beyond a reasonable doubt, that such original paper was emitted, made, or countersigned to answer the purpose of money, or for general circulation; and if the evidence leaves it doubtful whether such paper was issued for such purpose, or merely for the saving of time and expense; or, for the convenience of the Tallassee Manufacturing Company, in settling with operatives, its employees, — the jury must acquit the defendant." The court refused to give each of said charges, and the defendant excepted. Defendant was convicted, and thereupon brought the case to this court, and assigns for error, among other things, 1st. That the court permitted the copy of the paper incorporated in the indictment to be read to the jury, without proof of execution of the original paper; 2d. The refusal to give the first charge requested by him; 3d. The refusal to give the second charge requested by him; 4th. The statement by the court, in its charge, in reference to the action of the legislature, as set forth.

WATTS & WATTS, for appellant, cited: 1st. To the 1st point assigned as error, *Beall v. Dearing*, 7 Ala. 2d. To the 3d point (2d charge), 6 Ala. 845; 7 Ala. 69; *Winter & Scisson v. The State*, 20 Ala. 39; *Hopper v. Ashley*, 15 Ala. 457.

J. W. A. SANFORD, Attorney General, *contra*.

JUDGE, J. — The appellant was indicted in the court below, under section 3643 of the Revised Code, for "countersigning a paper partly written and partly printed, issued without authority of law, for the purposes of money, or for general circulation."

The indictment purports to set forth a copy of the paper, charged to have been illegally countersigned by the defendant. Evidence was introduced to show the loss of the original, from which the copy was made, and that on diligent search it could not be found. The court then permitted the counsel for the State, against the objection of the defendant, to read in evidence to the jury an examined copy of the lost paper, without such proof of the execution of the original as would have authorized its introduction.

Where the admission of evidence to the jury depends upon the proof of some fact as a foundation, such fact must be shown to the court. *Paysant v. Ware & Barringer*, 1 Ala. 161. But if the genuineness of an instrument of writing is the fact

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in question, "the preliminary proof of its execution, given before the judge, does not relieve the party offering it from the necessity of proving it to the jury. The judge only decides whether there is, *prima facie*, any reason for sending it at all to the jury." 1 Greenleaf's Ev. § 49; *Halliday v. Butt*, 40 Ala. 178.

We do not think it clearly appears from an examination of the subsequent proceedings appearing of record, that the error of the admission in evidence of the copy of the instrument was error without injury.

The first and second charges requested by the defendant were, we think, properly refused by the court.

The first was too restrictive in its character, as to the mode of proof of the execution of the instrument in question. The charge required the evidence of an eye-witness to the signature of defendant, or proof that he had admitted the signature to be his, or proof that the signature was in defendant's handwriting. We can readily conceive that circumstances, other than those mentioned in the charge, might be sufficient, if proved, to authorize a jury to come to the conclusion that the paper had been countersigned by the defendant.

The latter portion of the second charge requested and refused made the charge, as a whole, improper to be given. It asked the jury to be instructed as follows: "That if the evidence leaves it doubtful whether such paper was issued for the purposes of money, or merely for the saving of time and expense, or for the convenience of the Tallassee Manufacturing Company, in settling with its operatives and employees, the jury must acquit the defendant."

If this charge had been given, its tendency would have been to withdraw from the jury the consideration of the question as to whether the paper was emitted "for general circulation." The statute makes this a separate and distinct offence, from that of emitting such paper "to answer the purposes of money." Rev. Code, § 3643. Furthermore, the paper might have been issued "for the saving of time and expense, and for the convenience of the Tallassee Manufacturing Company, in settling with their operatives and employees, and still be obnoxious to the prohibition of the statute.

The remarks of the court, in its charge to the jury, relative to the action of the general assembly of the State at its recent session, on the subject of emitting change bills, were foreign to the issue on trial, and having been erroneous, we cannot clearly see that they did not operate to the injury of the defendant.

We deem it unnecessary to notice any other question presented by the record; but for the errors we have pointed out, the judgment must be reversed, and the cause remanded.

[Walker v. State.]

Walker v. The State.

Indictment for Murder.

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1. "*Served*," "*serving*;" meaning of. — The legal effect of the words "*served*," "*serving*," when used in a sheriff's return or minute-entry in reference to a copy of the indictment and list of jurors, is that such copy and list were "*delivered*" to the defendant as required by § 4171 R. C.

2. *Dying declarations*; *admissibility of*. — Dying declarations are inadmissible, unless made under a sense of impending dissolution, and concerning the circumstances immediately attending the acts occasioning the declarant's death and forming a part of the *res gestæ*.

3. *Same*; *case in point*. — Deceased was badly shot, and in reply to efforts by his physicians to encourage and buoy him up, said he "was mortally wounded, and knew he would die, and requested a minister to be sent for," which was done. On being questioned as to the circumstances of the difficulty, he replied, "I am suffering a good deal now. I will tell you more about it after a while." After this, but how long is not shown, the deceased made declarations which the court admitted against defendant's objection. *Held*, that the State should have shown how long it was after the encouragement was given before the declarations were made, and what the deceased's opinion then was as to his condition.

4. *Confessions*. — Statements made by the prisoner, at his own house, in response to a question "how he came to shoot the deceased," and not induced by any threats, duress, or promises, are admissible evidence against him.

5. *Venue*; *proof of*, *should be shown by bill of exceptions*. — Comments of the court on the necessity of bills of exceptions professing to set out *all* the evidence containing the testimony in respect to *venue*.

APPEAL from Russell Circuit Court.

Tried before Hon. JAMES E. COBB.

The facts are stated in the opinion.

GEORGE W. GUNN and JOS. B. McDONALD, for appellant.

J. W. A. SANFORD, Attorney General, *contra*.

MANNING, J. — The appellee was indicted for, and convicted of, murder in the first degree, and sentenced to be hanged. Many exceptions are taken to the proceedings in the court below, a portion of which are predicated upon matters set forth in a voluminous bill of exceptions. It will be necessary to mention only a few of the errors assigned and propositions discussed.

The appellee was a prisoner confined in jail, and was entitled to have delivered to him, one entire day before the trial, a copy of the indictment, and a list of the names of the persons summoned (seventy-five in number including the regular panel), from which jurors to try him were to be drawn (§ 4171 of the Revised Code). An order was made by the court requiring this to be done. The day of his trial was the 17th of November, 1874. A list of the seventy-five persons summoned, including the regular jurors of the week, is set out in the

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record, followed by this return, "Executed by serving copy of the within and copy of indictment on Seaborn Walker, November 15, 1874. J. S. Burch, Sheriff." In the judgment-entry is a recital that "the prisoner having been served with a copy of the indictment and a list of the jurors summoned for his trial one entire day previous to the trial," &c.

To this it is objected that the Rev. Code requires that a copy of the indictment and list of persons summoned "must be *delivered* to" the prisoner; and that it does not appear from the sheriff's return, or the entry of the court, that this was done. The words to *serve* and *service*, have a distinct and well understood meaning in legal practice. "*Service*" is defined in Burrill's Law Dictionary as "the judicial delivery or communication of papers; execution of process. The delivery or communication of a pleading, notice, or other paper in a suit, to the opposite party, so as to charge him with the receipt of it, and subject him to its legal effect." See also Tidd's Prac. 164 *et seq.* The objection, therefore, is not well taken.

Exception was taken to the admission in evidence, as dying declarations, of certain statements made by the person slain, on the day he received the mortal wounds. The law on this subject is well settled.

As such declarations are generally made in the absence of the person to be affected by them, without opportunity for cross-examination, and not under oath, they are not admissible against the accused "unless it appear to the court that they were made under a sense of impending dissolution, and a consciousness of the awful occasion; though the principle is not affected by the fact that death did not ensue until a considerable time after the declarations were made." "When every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth, a situation so solemn and awful is considered by the law as creating the most solemn of sanctions." 1 Wharton's Amer. Crim. Law (6th ed.) §§ 669, 671, and cases there cited.

But even then, such declarations are admissible in evidence only "when the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declarations." *Mose v. The State*, 35 Ala. 421; *King v. Mead*, 2 Barn. & Cr. 405. They are restricted to "the circumstances immediately attending the act and forming a part of the *res geste*." *Mose v. The State*, *supra*; *State v. Shelton*, 5 Jones Law (N. C.) 360; *Nelson v. The State*, 7 Humph. 542.

In the cause before us the witnesses to the dying declarations of Halliday, the deceased, were physicians, and "endeav-

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ored to encourage him and buoy him up by referring to men being wounded in battle, apparently much worse," &c. Although they believed he would die, they did not let him know that they thought he would. In response to their encouragements, he said, he knew he would die and requested that they would send for a minister; which was done. And to their questions about "the circumstances of the difficulty," he replied: "I am suffering a good deal now. I will talk to you more about it, after a while."

This indicates that he expected to get better. It is not improbable that he began to hope from their encouragement that he might recover. It was after this, that the statements received as his dying declarations were made; but how long afterwards does not appear. Nor does it appear what was his own opinion of his condition at the time when they were made. It was in the power of the State to have the testimony clearer and more definite on these points; and until it was made so, the declarations ought not to have been received in evidence.

There was error also in admitting, against the objection of the prisoner, that portion of the declarations of deceased in which he said, "that he had a difficulty with prisoner the previous day in the field of Abraham Halliday." This does not come within the rule above referred to, restricting the dying declarations, that are to be received as evidence against the accused, to the circumstances immediately attending the act of killing, or mortally wounding, and forming a part of the *res gestæ*. It was rather narrative of a past transaction.

The confessions of prisoner were properly received as evidence when offered by the State. It was proved that they were made at his own house, not under the influence of any threats or promises, but freely and voluntarily.

The other matters assigned as errors here, will not probably come up again in the court below; and we do not, therefore, now consider them. We remark, however, that it is surprising that so many criminal cases are brought up with bills of exception purporting to set out all the evidence therein, in which nothing is said about the proof of the *venue*. Inasmuch as the *county in which the offence was committed* must be proved in every criminal prosecution, in order to enable the court to pass judgment, the attorneys for the state, and the judges in the courts below, ought to be particular that bills of exception, professing to set out all the evidence, shall contain the testimony in respect to the *venue*.

The judgment is reversed and the cause remanded. The prisoner will be kept in custody until discharged by due course of law.

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[Longstreet v. Rea.]

Longstreet & Sedgwick v. Rea & Co.

Action on Promissory Note.

Suit against several as partners ; what judgment may be rendered in. — Where suit is instituted against several persons as partners on a note executed by the firm, and one of them makes good his plea of *non est factum*, the plaintiff may notwithstanding have judgment against the others unless they too make a good defence.

APPEAL from Circuit Court of Chambers.

Tried before Hon. LITTLEBERRY STRANGE.

E. G. RICHARDS, for appellant.

W. H. DENSON, *contra*.

MANNING, J. — Appellants sued Cornelius Rea, John Huguley and William Stone, as partners under the firm name of C. Rea & Co., for the amount of a promissory note made by that firm. Rea and Huguley pleaded the general issue, and Stone a special plea under oath, that he was not a member of that partnership and had not executed the note, or authorized any one else to do so for him.

On the trial, the note sued on was produced, and proof made that Rea and Huguley constituted the firm of C. Rea & Co., and that Stone was not a partner. Thereupon the court "charged the jury that as the proof showed that Stone was not a partner of the firm of C. Rea & Co., plaintiffs could not recover from any of the defendants in this action."

To this charge plaintiffs excepted, and also to the refusal of the court to charge that if the jury believed the evidence, plaintiffs were entitled to a verdict against Rea and Huguley.

Plaintiffs took a nonsuit with a bill of exceptions, and thereupon brought the cause by appeal to this court.

The counsel on both sides, though citing in their briefs other sections of the Code, have wholly overlooked one which is applicable to and decisive of the case. Section 2554 (2156) of the Revised Code provides that: "When a suit is instituted against several defendants, whether sued as partners or otherwise, the plaintiff may recover against one, or more, but is liable for costs to those against whom he does not obtain judgment."

The judgment is reversed and the cause remanded.

[Wimberly v. Dallas.]

Wimberly *et. al.* v. Dallas.*Action on Promissory Note.*

Issue as to execution of note foundation of suit; how only can be raised. — Although a promissory note declared on does not on its face purport to have been executed by the defendant, yet if its execution by him is averred, he cannot deny it, whether it was by mark, initial, or other designation, except by a sworn plea under § 2682 of Revised Code (overruling, on this point, *Flowers v. Bitting*, 45 Ala. 448.)

APPEAL from Circuit Court of Sumter.

Tried before Hon. LUTHER R. SMITH.

BRAGG & THORINGTON, for appellant.

ROBT. H. SMITH, *contra*.

BRICKELL, C. J. — As maker or indorser of a promissory note, or other contract in writing for the payment of money, a person may become liable, by any signature he thinks proper to adopt. It is not material whether he uses initials, or a mark, or any other designation, if his intention is to bind himself. *Brown v. Butchers' & Drovers' Bank*, 6 Hill, 443.

At common law, when a written instrument was the foundation of suit, if by a proper plea the execution of the instrument was put in issue, the plaintiff was bound to prove that the defendant, or some one acting by his authority, actually signed the instrument. The statute of this state declares all written instruments, the foundation of the suit, purporting to be signed by the defendant, his partner, agent, or attorney in fact, must be received in evidence, without proof of the execution, unless the execution thereof is denied by plea, verified by affidavit. R. C. § 2682. This section of the Code is a substantial reenactment of the territorial statute of 1811, (Clay's Dig. 340, § 152,) and must receive the construction given to that statute, in obedience to the rule, on which this court has uniformly proceeded, that in the adoption of the Code, the legislature is presumed to have known the judicial construction former statutes had received, and therefore the reenactment in the Code of provisions substantially the same as those contained in the former statutes, is a legislative adoption of their known judicial construction. *Ala. Coal Mining Co. v. Brainard*, 35 Ala. 476; 1 Brick. Dig. 349, § 2. The construction of the statute of 1811 was, that the allegation of the execution of the instrument sued on was mere matter of description, and if the instrument produced conformed to the description, no proof of execution was necessary, in the absence of a verified plea. *Dew v. Garner*, 7 Port. 503; *Stone v. Gover*, 1 Ala. 287;

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Fowlkes & Co. v. Baldwin & Co. 2 Ala. 705; *Lazarus v. Shearer*, *Id.* 718; *McWhorter v. Lewis*, 4 Ala. 198. Pursuing these decisions, this court construing the present statute, in the case of *Ala. Coal Mining Co. v. Brainard*, *supra*, held, that if the instrument sued on is averred in the complaint to have been executed by the defendant, though it does not purport on its face to have been so executed, it falls within the statute, and must be regarded as the act of the defendant, in the absence of a verified plea, putting in issue its execution. No other construction will subserve the purposes of the statute. The intention of its enactment was to relieve the plaintiff from the burden imposed by the common law, of proving the execution of the instrument sued on, unless the defendant by a verified plea denied its execution. In the absence of such plea, the fact of execution is not in issue; it is admitted of record by the defendant. From this construction no injury results to the defendant. He can always demand an inspection of the instrument, and it must be allowed him. R. C. § 2635. Whether he executed it, or whether it was executed by any one having authority to bind him, is a fact resting within his own knowledge, and it is not unjust to him, to foreclose all inquiry on that point, unless he will pledge his conscience in denial of it.

The promissory note on which this suit is founded, appears on its face to have been signed by the appellant Wimberly with his mark, and is not attested. This signature, it is insisted, is insufficient to bind him without proof of execution, under the first section of the Code, which declares "signature" or "subscription," when used in the code, includes mark when the person cannot write, his name being written near it, and witnessed by a person who writes his own name as a witness. The answer is, that no verified plea denying the execution having been interposed, the fact of execution was not in issue. It was not material how the note was signed, whether with a mark, or with the real name of the appellant, or with a fictitious name, or with any designation he had thought proper to adopt. Failing to interpose a verified plea, he had admitted of record the execution of the instrument. Beside, no proof was offered that he was unable to write, or that he did not in fact write his name, and make the mark, and it is only as to persons who cannot write that the definition of the Code applies. As presented, the question is, whether the note is in legal contemplation the act of the appellant Wimberly — whether it imposes on him a legal obligation or duty. That question, it was determined in the cases of *Fowlkes & Co. v. Baldwin & Co.*, *Lazarus v. Shearer*, *McWhorter v. Lewis*, *supra*, could be presented, under the statute only by a verified plea. The fact of execu-

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tion, or the legal effect of the manner of execution, not being in issue, the circuit court did not err in its rulings, to which exceptions have been reserved. The case of *Flowers v Bitting*, 45 Ala. 448, is in conflict with the views we have expressed, and on the point we have considered, is overruled.

The judgment is affirmed.

Moses & Beebe v. Mayor, &c., of Mobile.

Bill in Equity to enjoin Interference with Franchise.

1. *Constitutional law; subject-matter of act not clearly expressed in its title.*—The act of the General Assembly of Alabama, entitled "An act to establish the Mobile Charitable Association for the benefit of the common school fund, without distinction of color," approved December 31st, 1868, violates Art. IV. § 2 of the Constitution, and is therefore void. *Horst, Mayor, &c. v. Moses, et al.*, reaffirmed on this point.

2. *Legislative franchise; when equity will not enjoin invasion of.*—A court of equity will not interfere to prevent the invasion of a grant or franchise, before the establishment of the right at law, even where it is derived from an act of the legislature, if upon an inspection of the statute, a reasonable doubt exists as to the power of the legislature to enact it.

3. *Injunctions; never granted except in cases of a civil nature, strictly.*—As a general rule, courts of equity cannot interfere to stay proceedings in criminal matters, or in any case not strictly of a civil nature, nor to arrest the authorities charged with the execution of criminal laws, whether the prosecution be for violations of state laws, or for the infraction of municipal ordinances.

4. *Bill of Peace; when allowed.*—A bill of peace will lie only when the right claimed affects many persons; if the right is disputed between two persons only, not for themselves and all others in interest, but for themselves alone, the bill will be dismissed.

APPEAL from the Chancery Court of Mobile.

Heard before Hon. ADAM C. FELDER.

This was a bill in equity filed on the 17th day of August, 1871, by appellants, against the mayor, aldermen, and common council of Mobile; Martin Horst, mayor, R. M. Quinn, chief of police, and M. Phillips and Kassens, assistant chiefs of police, praying that the defendants be perpetually enjoined and restrained from interfering with or disturbing complainants in the enjoyment of the franchise and privileges which enured to them, or in carrying on the business which complainants alleged they were entitled to prosecute by virtue of the following act of the General Assembly of Alabama: "An act to establish the Mobile Charitable Association, for the benefit of the common school fund of Mobile county, without distinction of color.

"Section 1. *Be it enacted by the General Assembly of Alabama*, That I, Clifton Moses and Alfred H. Fowler, of Mobile, Alabama, and Eugene Beebe of Montgomery, Alabama, and their associates as partners, shall have the full right and

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authority to form themselves into a partnership association, to be known under the firm name and style of "I. C. Moses & Co.," or such other name as they may designate, for the purpose of receiving subscriptions, and to sell and dispose of certificates of subscription, which shall entitle the holder thereof to such prizes as may be awarded to them, which distribution of award shall be fairly made in public, by casting of lots or by lot, chance, or otherwise, in such manner as to them may seem best to promote the interest of the school fund of Mobile county, which said distribution of award and prizes, shall be made at their office in the city of Mobile, or such other place or places in the State as they may direct.

"Section 2. *Be it further enacted*, That before commencing business under the provisions of this act, said parties shall pay, or cause to be paid, to the board of school commissioners of Mobile county, for the use of the public schools of said county, the sum of one thousand dollars, and annually thereafter a like amount, for the term of ten years, or so long as said partnership shall choose to do business under the provisions of this act. It being understood and agreed, that said payment of one thousand dollars per annum by said partnership to said common school fund is the consideration upon which this privilege is granted; and whenever said company shall fail to pay said sum, according to the provisions of this act, then, and in that case, their right to do business shall cease.

"Section 3. *Be it further enacted*, That during the time business shall be done under the provisions of this act, the same shall be exempt from taxation, except for state purposes.

"Section 4. *Be it further enacted*, That this act shall remain in full force and effect for ten years, upon the consideration herein contained, during which time said partnership company shall have the right to exercise the privilege and franchise herein given, any law to the contrary notwithstanding. Approved December 31, 1868."

The bill then states facts showing a compliance on the second of February, 1869, with the requirements of said act, and the facts alleged as an excuse why the last of the annual payments was not made. The statements of the bill as to the nonpayment of the last annual payment of \$1,000 were denied in the answer, which alleged that the complainants had forfeited their franchises by this failure; but as the case did not turn on this point, it is unnecessary to refer further to the matter of this payment.

It is further alleged in the bill, that complainants had expended large sums of money in carrying on, and in preparing to carry on their business, and to comply with the requirements of said act. The bill then alleges that, in pursuance of their

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business, "as they were authorized by the said act, and conducting their said business in strict and entire accordance with the terms and provisions of the said act, that, in pursuance of their said business, they sold and disposed of certificates of subscription, which, by the terms thereof, and in fact, entitled the holders thereof to such prizes as might be awarded to them in the casting of lots as aforesaid, and that the distribution of awards was in each case made fairly in public by the casting of lots. That, for the purposes aforesaid, they adopted the means or contrivance of what is called a roulette wheel and ball as the lot or chance, which to them seemed best to carry out the object and purposes of the said act. That the roulette wheel is a revolving circle with a number of holes attached thereto, each of which is numbered, and the wheel is revolved in one direction, and at the same time a ball is thrown revolving upon and inside of said wheel in the opposite direction from that in which the wheel is revolved, and when the ball settles down in any one of the holes, the number attached to that hole is entitled to a prize; and that they have in all cases cast lots as aforesaid, and in the manner aforesaid, fairly and in public, and made such distribution of awards and prizes fairly and in public, and that in each case of said casting of lots as aforesaid there was only one set of said certificates sold or disposed of for each of said castings of lots as above said and described." It is further alleged in the bill "that in addition to the wheel and ball as above stated, they also at times, since December, 1870, used and are still using another method of determining by lot or chance the prizes in their said business, of the following character: in an oblong box are deposited ninety balls, each numbered from one to ninety; printed certificates of subscription issued to purchasers, each certificate containing three rows of numbers, five in each row; the number of certificates are numbered from one to one hundred and ninety-two inclusive, and the purchaser of the certificate selects any number of the certificate he desires; each certificate has different figures from every other certificate; the oblong box is revolved, and a ball is thrown out; the box is again revolved, and another ball is thrown out, and so on successively until the numbers on the balls so thrown out correspond with all the numbers in one of the rows on some one of the certificate, and when this occurs, the holder of such is entitled to the prize designated, and thus awarded; and that in each and every instance in the casting of said lots, either by said roulette wheel and ball, or by the oblong box and balls as aforesaid, the same has been conducted fairly and in public, and the distribution of awards so made and ascertained has been made in public; and that the selection of said modes of

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determining the prizes and the distribution of the same was made by your orators as the modes of lot or chance to determine the same, because these modes seemed best to your orators to promote the object of the first said act, and that the mode adopted as aforesaid by the use of the oblong box and balls, is upon the same principle as the game called keno is played or carried on."

The bill further states facts showing that on divers days in April and in June, 1870, and also in August, 1871, one of complainants and several of their agents had been arrested by the police officers of the city of Mobile, and, as they alleged, under authority of the laws and ordinances of the city of Mobile, on the ground that complainants and their agents, in carrying on said business, were violating the ordinances of the city of Mobile against exhibiting a gaming table. The bill further alleges that said police officers had arrested various persons attending the drawings had by complainants in carrying on their said business, and that the police officers and city authorities had repeatedly avowed their determination to arrest complainants and their agents, and would in the future continue to arrest them, upon the alleged ground that the business carried on by complainants and their agents was not authorized by the charter, and was in violation of the city ordinances against exhibiting gaming tables, &c.

The bill also alleges, that by reason of the arrests, annoyances, and hindrances above referred to, many persons had been prevented and were prevented from purchasing tickets at complainants' drawing; that complainants' business has been greatly injured thereby, they having been at great expense in preparing to carry on the same; that by reason of the arrests, &c., complainants have been damaged in their business, and put to great expense, and sustained large losses, and their business nearly broken up; that if the city authorities and police officers continue to disturb and hinder complainants, and arrest them and their agents and persons who attend the drawings, as complainants charge that defendants will, and, as they likewise avow, complainants' business will be utterly broken up and destroyed, and their franchise and the privileges conferred by said act rendered utterly valueless.

It is further alleged in the bill that the police officers who made the arrests referred to, have not more property than is by law exempt from levy and sale on execution.

The bill sets out that portion of the charter of the city prescribing by whom and in what manner arrests may be made for the commission of any public offence or violation of any city ordinance within the limits of the city of Mobile, and alleges that the mayor, aldermen, and common council, and the

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police officers making or ordering the arrest of complainants and their agents; or of persons purchasing certificates of subscription in complainants' drawings, as before detailed, would not be liable to complainants for the damage and losses complainants have already sustained, and would sustain by reason of the ordering and making of such arrests, inasmuch as defendants would be exercising judicial power, or power in its nature judicial, and in making such arrests themselves, if sued therefor for false imprisonment, could and would allege that they had reasonable grounds for such arrests, and would therefore be free from responsibility for such arrests. The bill further alleges "that unless complainants are protected by a court of chancery, they will be damaged to an extent and in a manner that cannot be estimated at law," "that their business is of that character which depends on the number of certificates of subscription purchased in their business, and it will be impossible to make any estimate thereof to any certainty by legal evidence, and for that reason no possible remedy at law can compensate them therefor, even if they could sustain action at law, and recover damages for such interference and disturbance of their said business."

The mayor, aldermen, and common council, Martin Horst, mayor, and the persons holding the offices of chief of police, and assistant chiefs of police, are made defendants. Complainants also prayed for the issue of a writ of injunction "directed to said Martin Horst, as mayor aforesaid, enjoining and restraining each and every member of the police force of said city, through him, the said mayor, as the head thereof, from interfering with or disturbing your orators, in the carrying on of their said business, either in the use of the scheme of the roulette table and ball, or in the use of the scheme of the revolving oblong box and balls, on the principle of the game called keno; or in the sale of their said certificates of subscription in either of said schemes, or disturbing any of their agents employed in carrying on their said business on the plans of either of said schemes, either by arresting your orators or any of their said agents, on the charge or pretence of violating thereby any ordinance of said city against gaming or against exhibiting a gaming table, either for any past or future acts done by them, or their said agents, in carrying on their said business as aforesaid, on the several schemes as aforesaid, or otherwise disturbing them therein."

There was also a prayer for a similar injunction against interference with persons who had become or might become holders of certificates of subscription, &c., and that on final hearing the injunction prayed be made perpetual. Sworn answers to the bill were waived.

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Application for an order for the issuance of injunction was made to a circuit judge, who granted the order, and upon complainants complying with the conditions prescribed in the *fiat*, the injunction issued as prayed for.

The defendants all answered. The answers allege that the act under which complainants' claim to carry on their said business was unconstitutional and void; that the privileges which said act purports to grant, are privileges not enjoyed by, and which it is not lawful for, a citizen of Alabama at large to enjoy; but that, on the contrary, the citizens of Alabama at large are by its penal laws expressly forbidden to enjoy such privileges, and that the exercise of such privileges are forbidden within the limits of the city of Mobile, by the ordinances thereof.

It is admitted that complainants, after the passage of the act, begun the business of carrying on a lottery; but the respondents distinctly denied that complainants did this "under the provisions of and strictly in accordance with the terms of said act; and say that, on the contrary they disregarded and failed to perform at the very outset the conditions imposed on them by said act, as the consideration thereof; and respondents insist that without the performance of said considerations, according to the terms of said act, no rights passed to complainants under said act, even if the said act were constitutional. Respondents say that complainants and their associates have not confined themselves to the business of carrying on a lottery, as contemplated by said act, but have abandoned the business of keeping and carrying on a lottery only, and have persistently and cunningly evaded the spirit, letter, and intent of said act, by various devices, and have set up, established, operated, kept, and carried on, in the city of Mobile, various devices which are not lotteries; and among them the device of roulette wheel and ball, and also the device known as keno, which are common gamblers' devices and gaming tables, and not lotteries, and which are other than and different in substance from the lottery devices first established by them as aforesaid; and respondents say that complainants, under pretext of cover by said act, have set up, kept, and maintained several gambling dens in the city of Mobile, at various places, wherein the said gambling table and device are kept, and in which the public is allured and invited to game for money, greatly to the demoralization of the citizens of Alabama."

The answers also set up facts to show that complainants had forfeited their franchise by non-payment of one of the annual payments required by the act, and denying the validity of excuses for such non-payment as set up in the bill; but as this part of the case had no material bearing upon the decision, it is not necessary to allude further to it.

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In the answers, an elaborate and detailed account is given of the mode and manner in which complainants carry on their business. Drawings and exhibits are attached to the answers, to show that the scheme of drawing, and mode of carrying on the business, was but a "cunning device to carry on gaming, and to promote the avaricious purposes of complainants to their own profit, without any regard to the object or purposes of said act, or the benefit of the common school fund of Mobile county." It is also alleged that "the device of a roulette wheel and ball is not, truly speaking, a lot or distribution of awards, but that the same is a common gambler's game, well known by gamblers, and in use by them as a gaming table in almost all the gambling dens in Europe and America."

It is impossible, without greatly and improperly lengthening the report of the case, to give a more extended synopsis than has already been given, of the minute and lengthy description in the answer of the mode and manner in which complainants carried on their business.

The arrests are admitted, and a purpose avowed to continue them in all lawful modes, to break up what respondents state they are advised is but a mere cover or device for carrying on gaming, and a violation of the laws of the State and the ordinances of the city.

The respondents (appellees) also demurred to the bill on the following grounds :

"1. That there is no equity in the said bill.

"2. That said bill shows on its face that complainants have not complied with the terms and conditions upon which the privileges, which the said act of 31st December, 1868, purports to give them, were granted.

"3. That said act of December 31st, 1868, is repealed.

"4. That said bill seeks to enjoin Martin Horst, as mayor of Mobile, and through him the police force of Mobile City, from the exercise of powers conferred on them by law.

"5. That said bill, in effect, seeks to enjoin and restrain the mayor of Mobile, sitting in, and holding and presiding over the mayor's court of Mobile, from exercising the quasi criminal jurisdiction conferred on him by law.

"6. That said bill seeks to enjoin and restrain the mayor of Mobile from exercising the duties and authority conferred on him by law, as *ex-officio* justice of the peace and magistrate.

"7. That said bill seeks to enjoin a trespass.

"8. That said bill shows that complainants have an adequate remedy at law.

"9. That the chancery court has no jurisdiction of the case made by said bill."

The bill was filed August 17th, 1871.

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The appellees, on October 17, 1871, made a motion in vacation to dissolve the injunction, "upon the denials in the answer, and the demurrers filed and for want of equity," which motion was overruled by the chancellor. An appeal was taken from the decision of the chancellor, and said decision was reversed by the supreme court (see 48th Ala. 129), and the cause remanded. Afterwards, in the chancery court below, the bill was dismissed, on motion, for want of equity, and the appellants Moses and Beebe appealed.

JNO. A. ELMORE, and RICE, JONES & WILEY, and O. J. SEMMES for appellants. Upon acceptance of the provisions of the act (Acts 1868, p. 511) by the persons therein named, it became a legislative contract. *Manaway v. The State*, 44 Ala.; *Horst v. Moses*, 48 Ala. 146, and authorities there cited; *State v. Heyward*, 3 Rich. (So. Car.) Law Rep. 389; *Oliver v. Lee & Co.'s Bank*, 21 N. Y. 14; *Boyd v. State*, 56 Ala. 329.

"It is true that legislative contracts are to be construed most favorably to the State, if, on a *fair consideration* to be given the charter, any *reasonable doubts* arise as to their proper interpretation; but as *every contract* is to be construed to *accomplish the intention of the parties to it*, if there is *no ambiguity* about it, and *this intention clearly appears on reading the instrument*, it is as much the duty of the court to uphold and sustain it, as if it were a contract between private persons." *Home of the Friendless v. Rouse*, 8 Wallace, 437; *The Washington University v. Rouse*, 8 Wallace, 440. Testing the contract in question by these rules, there does not seem to be any rational doubt as to its true meaning. 8 Wallace, 437.

It contains but one condition precedent, viz.: the payment of one thousand dollars to the board of school commissioners; all the other payments were in the nature of conditions subsequent. *Manaway v. The State*, 44 Ala. The just construction of the act is, that the partnership "may terminate the contract at pleasure, but that the State cannot do so before the termination of the ten years, except in cases of forfeiture. 48 Ala. 141-6. A contract may be optional as to one party, and obligatory on the other. *Disborough v. Neilson*, 3 Johns. Cases, 81.

This legislative contract cannot be impaired or destroyed, either by subsequent legislation, or by subsequent judicial decisions of state tribunals. . . . Judicial oscillation of state courts cannot be tolerated to the extent of converting into nullities contracts which at first had been treated as valid by all departments of the state government. *Gelpcke v. Dubuque*, 1 Wallace, 175; *Township of Pine Grove v. Talcott*, 19 Wallace, 678; *Olcott v. The Supervisors*, 16 Wallace, 678; *Delmas v. Insurance Co.* 14 Wallace, 661.

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In all cases of waste or destruction of franchises the court interposes by injunction against state or subordinate municipal officers, for the same causes and for like reasons that would induce it to interpose against mere private persons who ruinously interfere with the exercise of franchises granted by statute. *Osborn v. U. S. Bank*, 9 Wheaton, 340-2; *Davis v. Gray*, 16 Wallace, 203; *Mayor, &c. of Columbus v. Rodgers*, 10 Ala. 37.

Resemblance, however great, is not *legal identity*. In *legal contemplation* the distribution of awards and prizes upon *the principle* on which "a game called keno," is played, is not *per se* that game. A game played with dice and "conducted upon the principles of a raffle, is not a raffle, but a different thing." *Jones v. State*, 26 Ala. 155.

R. H. & R. I. SMITH and THOMAS H. HERNDON, *contra*. — The bill is filed to enjoin criminal prosecutions; there is no such thing known; it is the same thing in principle, as if a grand jury was enjoined, or a solicitor or a judge, from trying a criminal case. *Burnett v. Craig*, 30 Ala. 135; 1 *Waterman's Eden on Injunctions*, marg. p. 68. This injunction is in effect against a court; the mode of preventing a court from usurping jurisdiction is by prohibition, not by injunction.

The title of the act gives no indication of such power of gaming as is contended for; if therefore the act is sufficient to express the power, the act is void, because the subject of the law would not be clearly expressed in the title. Const. of Ala. Art. IV. § 2; *Cooley*, Const. Lim.; 48 Ala. 144 (per SARGENT, J.).

The bill seeks the protection of the court to exhibit two well-known gambler's games, roulette and keno; if what complainant proposes to play is not roulette and keno, he should have shown the difference. Sections 3621, 2, 3 of Rev. Code, prohibit betting on any gaming table, licensed or unlicensed. That the act of 1868, under which complainant claims, does not sanction what he insists upon doing, see *Horst v. Moses*, 48 Ala. 129; *Miller v. State*, 4 Ala. 122; *Aicardi v. State*, 19 Wallace, 635.

The annual payments were necessary, and the franchises (if any) were lost by failure to make such payments, and the repeal of the act of 1868 was good. Per PECK, C J., in *Horst v. Moses*, 48 Ala. 139. See also Acts 1870-1, p. 217.

BRICKELL, C. J. — The object of these bills is to obtain injunctions restraining the appellees, who are municipal officers of the city of Mobile, from prosecuting suits against the

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appellants, or their agents, for violations of the ordinances of the city.

It cannot be denied that it is competent for the general assembly to delegate to municipal corporations the power to make by-laws and ordinances, which, when authorized, have the force, as to persons bound thereby, of laws passed by the general assembly. *Dillon on Mun. Cor.* § 245, *Intendant of Marion v. Chandler*, 6 Ala. 899; *Mayor of Mobile v. Rouse*, 8 Ala. 515; *Mayor v. Allaire*, 14 Ala. 400. The city of Mobile is expressly clothed with power "to impose and appropriate fines, penalties, and forfeitures for the breach of the ordinances or by-laws," enacted by its corporate authorities. In the absence of an express grant of such power it would be implied; as an ordinance or by-law, without a penalty, would be nugatory. *Dillon on Mun. Cor.* § 272, *Intendant of Marion v. Chandler, supra*. The charter of the city prescribes the manner in which the corporate ordinances are to be enforced, and penalties for their violation inflicted. The remedy thus prescribed is exclusive, and has the form and characteristics of a prosecution for a violation of the criminal law, commenced before a justice of the peace, or other committing magistrate. In the exercise of the power conferred on him, to issue warrants of arrest, and to hear and determine accusations for violation of the corporate ordinances, the mayor acts judicially, and his court is an inferior court or jurisdiction. *Withers v. State*, 36 Ala. 252; *Intendant of Marion v. Chandler, supra*. A proceeding before the mayor, or other corporate authority, for a violation of an ordinance, is not a civil proceeding. It is a *quasi* criminal proceeding, punitive, and intended to protect and preserve the peace and good order of the corporate community, as criminal proceedings are intended for the preservation of the peace and dignity of the State. *Withers v. State, supra*; *Mayor v. Rouse*, 8 Ala. 515; *Brown v. Mayor*, 23 Ala. 722. The ordinances the appellants are charged with violating are directed against gaming within the city, and the mayor, aldermen, and council are clothed with authority to pass such ordinances.

At one time, the court of chancery in England exercised a jurisdiction partaking of a criminal character, but it was not without objection and protest from the commons, and the common law courts. It was excused, rather than justified, because of the inability of other tribunals to maintain internal peace and order, and because it was exercised for the defence of the poor and helpless. It passed away, when the necessity for its exercise ceased, and the common law tribunals were restored to power sufficient for the repression of violence and wrong. 1 *Spence Eq. Jur.* 341, chap. 4. Since, the jurisdiction of a

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court of equity has been purely and exclusively civil. The statute of this State declares its powers and jurisdiction shall extend to all "civil causes," in which a plain and adequate remedy is not provided in other judicial tribunals. R. C. § 698. The statute merely affirms and declares the existing law. In the case of *Lord Montague v. Dudman* (2 Vesey, Sen. 396), Lord Hardwicke, said: "This court has no jurisdiction to stay proceedings on a *mandamus*, nor to an indictment; nor to any information; nor to a writ of prohibition, that I know of." Lord Eldon, said: "It is well established by authority, that this court has originally no jurisdiction whatever either to enjoin or regulate the proceedings upon an indictment; but circumstances may give that jurisdiction; when, for instance, the relators are the persons prosecuting the indictment, I should have a control by order personally affecting them; but I am not satisfied that I have the same control over these defendants who have not come in." *Att'y Gen. v. Cleaver*, 18 Vesey, 219. In *Holderstaffe v. Sanders* (6 Mod. 16), Holt, C. J., said: "Surely chancery will not grant an injunction in a criminal matter under examination in this court; and if they did, this court would break it, and protect any that would proceed in contempt of it." The most approved elementary writers, citing these authorities, state it "as a general rule, that courts of equity will not interfere to stay proceedings in criminal matters, or in any cases not strictly of a civil nature. They will not grant an injunction to stay proceedings on a *mandamus*, or an indictment, or an information, or a writ of prohibition. 2 Story's Eq. § 893; 2 Dan. Ch. Pr. 1620; Hilliard on Inj. 19, § 30, 223, § 7. Following these authorities, this court, in *Montgomery & W. P. R. R. Co. v. Walton* (14 Ala. 209), declared: "The courts of law have complete jurisdiction to punish the commission of crimes, and can interpose to prevent their commission by imprisoning the offender, or binding him to keep the peace. But courts of equity have no jurisdiction over such matters; at least a court of equity cannot entertain a bill on this ground alone." The case of *Burnett v. Craig* (30 Ala. 135) does not in principle differ from the cases under consideration. The purpose was, as in these cases, to obtain the interference by a court of chancery, to restrain municipal authorities from repeated prosecutions for violations of municipal ordinances. Declaring the prosecutions were *quasi* criminal proceedings, the court said a bill in chancery, to restrain a malicious or unfounded prosecution, is certainly of novel impression, and that there was neither principle or authority to support it. A similar decision was pronounced in *West v. Mayor of City of New York*, 10 Paige, 539. The principle rests not only on the character of the proceeding for

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violations of municipal ordinances, but because if the accused is not liable to the penalty, the defence at law is perfect. Municipal authorities would be paralyzed in discharging the public duties intrusted to them, if every offender, against the ordinances they have proclaimed, could, by injunction, arrest them, or could, by multiplying his offences, invoke the interference of a court of equity. If the court could take jurisdiction, and should determine the municipal ordinances valid, and that the party complaining was guilty of its violation, it could only remit him to trial before the tribunal having jurisdiction. It could not impose the penalty denounced by the ordinance. If corporal punishment is the penalty, or a part of it, through the interference of the court, it could be escaped. It seems evident, that a court of equity cannot interfere to arrest the authorities charged with the execution of the criminal law, whether it pertains to the state at large, or to the municipalities, which are agencies in the administration of civil government.

The counsel for the appellants have sought to withdraw the case presented by the bills, from the operation of this general principle, and the authorities by which it is supported, upon the ground that the interference of a court of equity is necessary in this case for the prevention of vexatious litigation, and of a multiplicity of suits. It could well be said in answer, the litigation and multiplicity of suits apprehended, are criminal in their character, and without the jurisdiction of the court. The prevention of litigation under some circumstances proves a subject for equity jurisdiction. The foundation of the jurisdiction is the quieting and suppression of litigation, and the remedy is known as a "Bill of Peace." To entitle a party to maintain it, there must be a right claimed affecting many persons; "for if the right is disputed between two persons only, not for themselves, and all others in interest, but for themselves alone, the bill will be dismissed." 2 Story's Eq. § 857; *Morgan v. Morgan*, 8 Stew. 388; *Gunn v. Harrison*, 7 Ala. 585. In the case of *Eldridge v. Hill* (2 Johns. Ch. 281), the defendant had sued the complainant for a nuisance, and at the expiration of each week, sued for its continuation until there were fifteen or twenty suits pending, and he threatened to sue indefinitely, until an abatement. The bill was filed for an injunction to restrain the prosecution of all the suits but the one for the erection of the nuisance, and the commencement of any others, until that should be determined. Ch. J. KENT refused the injunction, saying: "No case goes so far as to stop these continued suits between two single individuals, so long as the alleged cause of action is continued, and there has been no final or satisfactory trial and decision at law upon

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the merits." In that case, as in this, the complainant was seeking to prevent suits which could only arise from a continuance of his own acts, each giving (as was supposed) a new cause of action. The determination of any one of these suits, would have finally settled the litigation. Whether the obstruction of a flow of water, by the complainant, was a nuisance, authorizing an action at law, by the defendant, was necessarily involved, and must have been decided in each and all of these suits. The judgment in any one of the suits, would have been evidence, and conclusive evidence on this point, in all the others. If the complainants were preferring a right or claim affecting numerous parties, the judgment against one would not be binding on, or evidence against, the others, and hence a court of equity sometimes interferes to prevent the multiplicity of suits, and the continuance of litigation, which would be necessary to quiet the right. But when one party only is interested, and the right has not been established at law, the court will not intervene—the necessity of intervention does not exist. In *West v. Mayor of New York, supra*, the jurisdiction was attempted to be maintained on this ground, but the chancellor said: "I am not aware of any case in which this court has sustained such a bill, to prevent the defendant from suing at law, where the rights of the parties depended upon a question of law merely, and where the defendant in the suit at law must eventually succeed without the aid of this court, if the law was in his favor." "The separate repetition of trespasses," say the supreme court of Ohio," laying a ground for separate suits, between the same parties, is not that description of multiplicity of suits, which induces equity to interfere." *McCoy v. Chillicothe*, 3 Ohio, 379. We cannot resist the conviction, that it would promote, rather than quiet litigation, if, under the protection of a temporary injunction, a party could repeat acts, each of which may furnish his adversary just cause of action. The equity of these bills cannot be supported as necessary to the prevention of a multiplicity of suits. If the prosecutions are unfounded, the defence at law is perfect, and if well founded, there should be no interference with the tribunals having exclusive jurisdiction of them. If a doubt as to the liability of the appellants to prosecution exists, they could avoid all multiplicity of suits, by abstaining from the acts which give rise to them.

It was also insisted, that the statute under which the appellants claimed the right to do the acts charged to be infractions of the city ordinances, conferred upon them franchises or special privileges which were threatened with destruction, and which a court of equity alone could preserve from invasion and destruction. A court of equity frequently intervenes when the

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courts of law cannot afford adequate remedies to prevent the violation of franchises, or special privileges granted by the legislative authority of the State. A difference observed in cases of this character, and where mere private rights, not originating in express legislative grant, or dependent on special legislative enactment, are involved is, that the owner of the franchise or privilege, is not compelled to a suit at law for the establishment of his right, as a condition precedent to equitable interposition. The legislative grant, or enactment, is regarded as equivalent to a judgment of a court of law declaring the right. High on Inf. 319, § 571. The right must be clear, and the party in its undisputed possession or exercise. If a doubt exists as to the right, or it is uncertain whether the acts complained of are infractions of it, a court of equity ought not to interfere, until the right is ascertained at law. *Morr v. Veazie* 31 Me. 360; *Piscataqua Bridge v. N. H. Bridge*, 7 N. H. 35. If the franchise or privilege is assailed as invalid, because of the unconstitutionality of the statute from which it is derived, and on an inspection of the statute a reasonable doubt exists whether the legislature had the power to enact it, a court of equity would not interfere. It is only when the court, on an inspection of the statute, has not reasonable doubt of its constitutionality, that it will interpose, to prevent the invasion of the privilege or franchise it confers. *Morr v. Veazie, supra.*

Conceding the bills present a clear case of invasion, and threatened destruction of the statutory privileges and franchises claimed by the appellants, we are compelled to inquire into the constitutionality of the statute from which they are derived. When these cases were before this court at the June term, 1872, a majority of the court pronounced the statute in violation of the Constitution. We concur fully in the opinion of Judge SAFFOLD, that it offends the constitutional mandate, that "each law shall contain but one subject, which shall be clearly expressed in its title." *Horst, Mayor, &c. v. Moses*, 48 Ala. 129. The decision then rendered should have put an end to this litigation and should have been regarded as a final condemnation of the statute, and the rights and privileges which have been claimed under it.

The history of this clause of the Constitution, the purposes it is designed to accomplish, and the policy in which it is founded has been, in this and other courts, the subject of frequent consideration. It is of comparatively recent origin, and produced a radical change in the established modes of legislation. It is not matter of surprise that the construction and interpretation it should bear, was matter of controversy, which judicial decision alone could finally determine. The courts have carefully avoided a construction which would embarrass legislation.

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Sentence of nullity has not been pronounced against legislative enactments, because of the generality and comprehensiveness of the titles with which they may be introduced, when these fairly indicate the general subject of the enactment. They have firmly demanded that the title should avoid deception as to the subject of the enactment, and should announce that subject. *Ex parte Pollard*, 40 Ala. 98; *Cooley Cons. Lim.* 143-146.

This constitutional prescription of a rule of legislation, can have been intended to accomplish but one purpose, the suppression of a practice previously too prevalent, leading to unfortunate, and sometimes corrupt legislation, by which several projects, or subjects having no proper relation to each other were combined, and the supporters of each united in passing all into laws; and the prevention of the deception of the legislature and the people, by concealing under alluring titles, legislation which, if its real character had been disclosed, would have been denounced. The statute we are considering is confined to one subject; the inquiry is, whether that subject is expressed in the title. When the subject and the title are compared, it seems to us ingenuity could not have devised a title more delusive and less expressive of the real purpose and subject of the statute. It is entitled "An Act to establish the Mobile charitable association, for the benefit of the common school fund of Mobile county, without distinction of color."

The first section authorizes four persons who are named, and their associates to form themselves into a partnership, "to be known under the firm name and style of I. C. Moses & Co. or such other name as they may designate." The purpose of this partnership is, "receiving subscriptions, and selling and disposing of certificates of subscription which shall entitle the holder thereof to such prizes as may be awarded to them, which distribution of award shall be fairly made in public, by casting of lots, or by lot, chance, or otherwise, in such manner as to them may seem best to promote the interest of the school fund of Mobile county;" "the distribution of award and prizes," to be made in Mobile, or such other place in the State as they may direct. The second section required the partnership to pay annually to the common school fund of Mobile county, one thousand dollars in consideration of the privilege conferred by the first section. The third section exempts the partnership from all other than state taxation. The fourth section continues the act for ten years, "during which time said partnership company shall have the right to exercise the privilege and franchise herein given, any law to the contrary notwithstanding." We refrain from all discussion of this singular and remarkable statute, confining our inquiries only into its conformity

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to the constitutional provision, to which reference is made. The subject of the statute as expressed in the title, is the establishment of a charitable association. If the statute is valid, it authorizes the formation of a partnership with a partnership name, without any of the distinctive characteristics of an association, which is without personality, invisible, intangible, except through its officers and agents. Reading the title, all schemes for mere individual gain or profit would seem to be excluded, and the advancement of the public good the primary controlling purpose. The statute is devoted chiefly, if not entirely, to the mere pecuniary profit of the partnership, while the only possible public benefit is secondary, insignificant; and that the statute may bear the appearance of a legislative grant, or contract, is to be paid into the school fund, as a *consideration* for the franchise or privilege the partnership enjoys. The title indicates that the subject of the statute not only comports with, but is in advancement of public morality, while the real subject so far as it can be intelligibly deduced from the vague generalities in which it is expressed, without statutory indulgence or dispensation, would be offensive to the criminal law. The constitutional provision is vain and useless if this enactment can be supported. The state is not freed from its liability to unwise or vicious legislation against which it was intended to guard, but may be involved in it to the same extent as if this provision had never been incorporated in the Constitution. The legislature can be misled by titles fair and unobjectionable, into the adoption of measures the most odious, and wholly alien to the title. Convinced that the statute is violative of the Constitution, no franchise or privilege is conferred on the appellants. All interference with the municipal authorities in enforcing the ordinances the appellants were charged with violating, was unwarranted. The decrees of the chancellor are thereupon affirmed.

Owens v. The State.

Indictment for keeping or exhibiting a Gaming-table.

Gaming-table; keeping or exhibiting, constituents of offence.—The only proof of "Keeping or exhibiting a table for gaming," consisted of the testimony that defendant urged witness to go with him to defendant's room; that witness, defendant and two others, went to defendant's room, which contained a bed on which he slept and "a plain, pine table, without letters, device or figures thereon," from which defendant took up a deck of cards, separating the pack into two parts, in one disclosing an "ace" and the other a "king," and offered to bet witness a sum of money that defendant could shuffle the two portions so as to bring out the "ace" and "king," together; that witness declined, when one of the persons who accompanied them to the room, offered to "go halves" with witness, if he would

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bet, which witness declined; that witness shortly left the room; that nothing was done with the cards, other than as stated; that no game was played and no offer made to play any game or to make any other bet. *Held*: 1. That the evidence did not authorize the conviction of defendant under § 3621 of the Revised Code, for "keeping or exhibiting a table for gaming." 2. That under such a state of facts, it is error for the court to charge, *ex mero motu*, "that any table which was kept for the purpose of playing cards or other games thereon, whether the table formed a part of the game or not, was a gaming-table within the meaning of the statute; and that to constitute a gaming-table it is not necessary that any game should ever have been played on the table, if it was "kept and exhibited for that purpose."

APPEAL from the City Court of Montgomery.

Tried before Hon. JOHN A. MINNIS.

The facts are stated in the opinion of the court.

R. M. WILLIAMSON, THOMAS G. JONES and JEFFERSON M. FALKNER, for appellant.

JOHN W. A. SANFORD, Attorney General, *contra*.

JUDGE, J. — The appellant was indicted and convicted, under section 3621 of the Revised Code, for "keeping or exhibiting a table for gaming."

The only witness examined for the prosecution was one Merritt, who testified in substance as follows: That on the morning of November 19, 1874, the witness was invited by the defendant to his room; that witness at first declined to accept the invitation, but on being repeatedly solicited by defendant to make the visit, said he would have to go to a clothing store to get him a new shirt; that defendant then told witness that if he would go to his room, that he, defendant, would loan witness a clean shirt; that thereupon witness went to defendant's room, in company with defendant, and one Jacob Farden, and John Murphy, and in the room put on one of defendant's shirts; that after witness had dressed, defendant took up a deck of cards, which was lying on a small pine table, and opening the deck disclosed a king and an ace in the two respective portions of the deck, and proposed to bet witness five dollars that he could so shuffle the cards as to make the ace and king come out together; that witness refused to take the bet, when said Farden offered to go halves with the witness, if he would bet; that witness again refused to bet, and immediately left the room. The witness further testified that nothing more was done with the cards than as above stated; that no game was played, and no offer made to play any game, or make any other bet; and that the table was a plain pine table with no letters, figures, or devices thereon.

It was also proved that there was a bed in the room on which defendant slept.

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The bill of exceptions purports to set out all the evidence introduced on the trial, and the above is the only testimony which tended to establish the charge as laid in the indictment.

The court *ex mero motu* charged the jury as follows: "That any table which was kept for the purpose of playing cards, or other games thereon, whether the table formed any part of the game or not, was a gaming-table within the meaning of the statute; and that to constitute a gaming-table, it is not necessary that any game should ever have been played on the table, if it was kept and exhibited for that purpose."

This charge was too broad, and besides was calculated to mislead the jury. Without undertaking to define what is necessary in all cases to constitute the particular offence for which the defendant was indicted, we hold that the evidence in this cause was not sufficient to justify the above charge.

The defendant requested the court to give to the jury the following charge: "That if the proof shows that no game was played; and that a deck of cards was on the table in defendant's room, and that defendant proposed to bet that he could shuffle the cards, and bring out the ace and king together, and the bet was not taken, and there is no evidence that any other game was ever played in said room, or on said table, then the defendant cannot be convicted."

Under the evidence, this was a proper charge, and the court erred in refusing to give it.

Let the judgment be reversed and the cause remanded; and the defendant will remain in custody until discharged by due course of law.

Laura Bell v. B. H. Craig, Administrator.

Bill in Equity to prevent Cloud on Title.

1. *Estoppel; sale of decedent's lands.* — The administrator *de bonis non*, creditors and others interested in a decedent's estate, are estopped from questioning the validity of an order of sale of his lands, the fairness of the sale not being impeached, if they have treated the purchase-money as assets, received the benefit of it, and it has been fully accounted for on final settlement by the administrator in chief.

2. *Same; same; cloud on title.* — In equity, such a sale, although made under a void order, will be treated as valid as to those who have received the fruits of it, and the court of chancery, at the instance of the purchaser, or one claiming under him, to whom the administrator and heir had conveyed the legal title, will prevent by injunction, the cloud on the title, caused by a second sale by the administrator *de bonis non* under an order of the probate court.

APPEAL from Dallas Chancery Court.

Heard before Hon. CHARLES TURNER.

This was a bill filed by Laura Bell against B. H. Craig, as

52	215
98	448
52	215
96	561
52	215
99	49
99	59
52	215
119	397
52	215
122	609
52	215
130	512

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administrator *de bonis non* of the estate of one M. Hildebrandt to enjoin Craig as administrator, from selling certain lands therein described, under a decree of the probate court of Dallas county.

M. Hilderbrandt was the owner of the lands in question at the time of his death; his only heir qualified as administrator of his estate, and sold said lands for payment of debts under decree of the said probate court, and made a conveyance thereof as such administrator, and also individually, to the purchaser. The bill also shows that complainant's title to said lands was traced by a regular chain of title, from such purchaser, and that she was in possession; that said administrator in chief was paid for said lands in full, and the purchase-money was applied by him to payment of the debts due by the estate; and that the appellee had obtained another decree of said court to sell said lands, and was proceeding to do so, as such administrator *de bonis non*. On the hearing, the chancellor dissolved the injunction and dismissed the bill for want of equity.

WHITE & BOYNTON, for appellant.

W. E. BOYD (with whom were WATTS & TROY), *contra*.

BRICKELL, C. J. — It is not necessary to inquire whether the decree of the court of probate, ordering a sale of the lands in controversy, is void, or merely irregular. If void, the legal title to the lands has passed to the appellant by the deed of the sole heir of the intestate, and should not under the facts in this case be clouded by a sale by the administrator *de bonis non*, under a decree of the court of probate. The power of an administrator to sell lands under a decree of the court of probate, for the payment of debts like the power conferred on an executor by will, to sell for the same purpose, cannot be frustrated or impaired by the alienation of the heir. 1 Lomax on Ex. 385. Yet, when a sale is made by an administrator under a void order, and the purchase-money is received and applied in the due course of administration, and the fairness of the sale is not impeached, the purchaser acquires an equity which would entitle him to demand of the heir the legal title. If the heir has conveyed it, he has but done that which he would have been compelled to do, and the conveyance will in a court of equity be sustained, as if it had been by that court decreed. *Wilson v. Sheppard*, 28 Ala. 623.

It appears that the administrator in chief made a final settlement of his administration to which the appellee as administrator *de bonis non* was a party. On this settlement the purchase-money received by the administrator in chief for the lots in

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controversy, was charged against him, and accounted for fully. A balance was found due the administrator in chief, for which a decree was rendered against the appellee as administrator *de bonis non*. This settlement and decree operates to estop him from questioning the validity of the order under which the administrator in chief made sale of the lands. If the sale was void, the purchase-money was not assets in the hands of the administrator in chief. *Pettit v. Pettit*, 32 Ala. 288. It belonged *ex equo et bono*, to the purchaser. Neither the administrator *de bonis non*, nor the creditors or heirs of the intestate had any claim or right to it. It would be unjust to permit him now after having treated the purchase-money as assets, suffered them charged against the administrator in chief, and after all who have interests in the estate have received all the benefit which could accrue from a regular and valid sale, to treat the sale as void. It would operate a fraud on the purchaser, which cannot be tolerated. Those who have interests in the estate would receive compensation for the lands a second time, at the expense of a purchaser, whose good faith is not impugned. Whenever lands are sold under a decree of the court of probate, and the purchase-money is received by the administrator and accounted for in the settlement of his administration, the sale in a court of equity will be treated as valid, and the parties estopped from impeaching it. *Pickens v. Yarborough*, 30 Ala. 408.

The decree of the chancellor is reversed and a decree here rendered, reinstating and perpetuating the injunction, and the appellee must pay the costs in this court, and in the court of chancery.

Preston v. Dunham.

Action on Promissory Note.

1. *Variance; what not material.* — A note payable "by" the first day of November, 1870, to "John L. Dunham, ag't or bearer," may be properly declared on as payable to John L. Dunham "on" the first day of November, 1870.

2. *Plea, what demurrable.* — An unsworn plea by the maker that the plaintiff is not the owner of the note sued on is demurrable, although on motion it would be stricken from the files.

3. *Same; what frivolous.* — A plea to an action for the price of guano, that inspection laws passed long subsequent to the sale had not been complied with, is frivolous, and should be stricken from the files.

4. *Evidence; what irrelevant.* — Proof that third persons used some of the same kind of guano as that for the price of which defendant is sued, and that it was "worthless," is irrelevant; so also is proof that the guano had never been inspected — the inspection laws having been enacted after the sale.

5. *Worthlessness of article sold; when no defence to recovery of price.* — The unsoundness or worthlessness of an article purchased is no defence to a recovery for the price, when there was no warranty, false representation, or fraudulent concealment.

6. *Charge; what may be refused.* — A charge not moved for in writing, or asserting several legal propositions, any one of which is incorrect, is properly refused.

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APPEAL from City Court of Opelika.

Tried before Hon. JOHN M. CHILTON.

The opinion states the case.

G. W. HOOPER, for appellant, sought to distinguish this case from those of *Ricks v. Dillahunt*y, and *West v. Cunningham*, citing on this point *Chandler v. Lopus*, Cro. Jac. ; 4 Dyer, 75 ; and *Parsons on Contracts*, vol. i. p. 578.

J. R. DOWDELL, *contra*. — The note was properly declared on in the form given by the Code. *Harrison v. Weaver*, 2 Port. 542. The charge of the court was correct. *Ricks v. Dillahunt*y, 8 Porter, 134 ; *West v. Cunningham*, 9 Porter, 104 ; *Armstrong v. Buford*, in MSS. The charge refused was abstract ; there is no evidence to prove many of its recitals. The evidence as to the inspection laws were wholly irrelevant ; they were not in existence when the contract was made.

JUDGE, J. — This was an action upon a promissory note, and was declared on as follows : “ The plaintiff claims of the defendant one hundred and seventy dollars due by promissory note made by him on the seventh day of March, 1870, and payable the 1st day of November, 1870, with interest thereon, which said note is the property of the plaintiff.”

The note offered in evidence by the plaintiff was as follows : “ By the first day of November next, I promise to pay J. S. Dunham, ag’t, or bearer, one hundred and seventy dollars, being for guano this day furnished by J. S. Dunham, ag’t, to enable me to make a crop this year. This the 7th day of March, 1870. (Signed) ISAAC N. PRESTON.”

The defendant objected to the introduction of the note in evidence on the ground that it was variant from that described in the complaint.

The rule is, that when the pleader attempts to set out the contract in *hæc verba*, a *technical variance* in an immaterial matter will be noticed. But when the pleader does not attempt this particularity, it is sufficient to declare according to the legal effect of the contract. *Harrison v. Weaver*, 2 Port. 542.

One variance here complained of is, that the word “ag’t,” which occurs in the note, is omitted in the complaint ; another is, that the note is made payable “by” the first day of November, when it is described as being payable “on” said day ; and still another is, that the complaint omits to state the consideration on which the note was given as it is set forth in the note itself.

We hold that the note was described according to its legal
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[Preston v. Dunham.]

effect in every respect, and that the city court did not err in overruling defendant's objection.

The defendant's pleas numbered 4, 5, and 6, respectively, were severally demurred to by the plaintiff, and the demurrer to each was sustained. Plea numbered 4 was, that the note sued on was not the property of the plaintiff; this plea was not verified by affidavit, and there was no error in sustaining the demurrer to it, although it might, on motion, have been stricken from the files. Plea numbered 5 was, that the guano which constituted the consideration of the note had not been inspected as required by a statute of the State. The act providing for the inspection and stamping of fertilizers offered for sale within this State did not become a law until March 8, 1871; the note sued on was executed just twelve months before, so that the statute was not in existence when the contract was made. This was sufficient, waiving the consideration of all other defects in said plea, to justify the action of the court in sustaining the demurrer to it. The 6th plea was, that "said guano was required to be inspected by the laws of Georgia," and that this had not been done. The record fails to give us any information by which we can perceive any connection between the laws of Georgia and said guano. The demurrer to this plea was also rightfully sustained. We think the court might well have ordered to be stricken from the files the whole of said pleas from the 4th to the 6th inclusive, on the ground that they were frivolous.

The defendant offered to prove by one Dunn that he had used the "same kind" of guano as that purchased by the defendant, and that it was "worthless and of no value." The court refused to permit him to introduce this evidence, and committed no error in so doing, as it would have been irrelevant to the issue. And so of the proposed evidence of the same witness, which was rightfully excluded, that he was inspector of guano for Lee county, and that the guano sold to defendant had never been inspected.

The court gave to the jury the following charges: "That if they should believe from the evidence that the note sued on was given for guano, and that the guano was delivered to the defendant, then they must find for the plaintiff, even though they should believe from the evidence that the guano was worthless; provided, however, there was no warranty of the article or false representations made by the seller, or his agent, in regard to it." To this charge the defendant excepted.

It is the settled law of this State, that, "to entitle the purchaser to recover for any defect in the quality or soundness of the article or property sold, except under special circumstances,

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he must prove that the seller warranted the thing sold to be good and sound, or that he concealed or fraudulently represented its qualities." *Ricks v. Dillahunt*, 8 Porter, 133; *West v. Cunningham*, 9 Porter, 104; *Barnett v. Stanton & Pollard*, 2 Ala. 181.

The bill of exceptions in this case purports to set out all the evidence introduced on the trial, and there is no evidence whatever showing or tending to show that the plaintiff warranted the guano sold to the defendant to be good and sound, or that he made any fraudulent representation or concealment as to its qualities. There was no error, therefore, in the charge of the court.

The court properly refused to give the charge requested by the defendant, which was as follows: "If the plaintiff represented the guano to be a good article, by himself or agent, and it proved to be worthless, then the plaintiff cannot recover; and if the evidence is precisely balanced, the plaintiff cannot recover."

This charge was properly refused, if for no other reason, because it was not moved for in writing. Rev. Code, § 2756; *Milner & Wife v. Wilson*, 45 Ala. 478. Furthermore, it was abstract; if not wholly so, the first position of it clearly was. And inasmuch as the charge asserted two distinct legal propositions, one of which was erroneous, the court rightfully refused to give the whole. *Slater v. Carter*, 35 Ala. 679.

It follows from what we have said that the judgment must be affirmed.

Crowder, Newman *et al.* v. Moone.

Appeal from Order appointing Receiver.

1. *Appointment of receiver; pendency of suit essential to authorize.* — The filing of the bill is the commencement of the suit in chancery, and until suit is thus commenced the court of chancery has no authority to appoint a receiver.

2. *Notice to interested parties; when may be dispensed with.* — Except in very special cases, where irreparable injury will result from delay, necessary and interested parties must have notice and an opportunity to be heard before the order is made, and on appeal it will be a fatal objection to an order made without notice, that the necessity dispensing with it does not appear.

APPEAL from Chancery Court of Madison.

Heard before the Hon. R. S. WATKINS.

This was an appeal from an order appointing a receiver, made "at chambers in vacation" the day before the bill was filed with the register. No notice of the application was given the defendants. The other facts, so far as material, will be found in the opinion.

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L. P. WALKER and JAMES ROBINSON, for appellant. — The appointment of a receiver cannot be made until the bill is filed. R. C. § 3329. The suit is not commenced until then. 7 Metcalf, 161; 1 Burril Law Dic. 625; 1 Bouvier, 524. Notice was absolutely essential, or some valid excuse for not giving it. Edwards on Receivers, p. 77; 5 Paige, 521; 8 Paige, 373; 14 Beavan, 423.

LUKE PRYOR & R. A. McCLELLAN, *contra*.

JUDGE, J. — The order appointing a receiver in this case was made in vacation, and one day before the bill was filed. The order was made on the sixteenth day of January, 1874, and the bill was filed on the next day thereafter.

A suit in chancery is not commenced until the filing of the bill; thus it appears that this suit was not pending when the order appointing a receiver was made. Rev. Code, section 3382.

We hold that the general power of the court of chancery to appoint a receiver, requires a suit to be pending; and such seems to be the rule in England save in extreme cases. Edwards on Receivers, p. 13.

But another and a fatal objection exists to the order in this case; it was made without previous notice to the necessary and interested parties. As a general rule such notice is necessary; but the rule is subject to exceptions in special cases where irreparable injury would be sustained by the delay. In the present case it was not shown that special circumstances existed which rendered it necessary or proper to put a receiver upon the property of appellants without giving them an opportunity to be heard. *The People v. Norton, et al.* 1 Paige, 17; *Sanford v. Sinclair*, 8 Paige, 372. The record informs us that two of the appellants, Crowder and Newman, who are interested, with the appellee, in the property involved in the litigation, reside in Madison county where the bill was filed; and there is nothing in the record to show that they could not have been readily notified of the application.

We do not deem it necessary to discuss the question as to whether the case is a proper one for the appointment of a receiver, or if it is, whether the *ex parte* showing made is sufficient to authorize it.

The order of the chancellor must be revoked and annulled, and the cause remanded.

BRICKELL, C. J., having been of counsel, did not sit in this case.

[Kimmey v. Calloway.]

Kimmey v. Calloway.*Action to recover Price of Cattle sold.*

Introduction of evidence; control of court over. — The issue being a sale of cattle to defendant and he before closing having testified, as a witness in his own behalf, that the sale was not to him but to a third person, the court cannot require the plaintiff, having the right to rejoin, before introducing declarations of defendant, on a named occasion, to the effect that he had the cattle, to first call the defendant back and ask him if he had made such declarations — they are admissible in rebuttal.

APPEAL from Circuit Court of Pike.

Tried before Hon. J. McCaleb Wiley.

Kimmey sued Calloway to recover the price of six beef cattle which he alleged he had sold to him.

The plaintiff opened his case and laid his evidence before the jury. The defendant introduced his testimony and closed, but before closing testified, as a witness in his own behalf, that he had made no contract with the plaintiff for the sale of the beeves, and stated facts tending to show that one Nelms was the party that had been really contracted with by the plaintiff. There was also a dispute between the parties as to whether the cattle had ever been delivered to the defendant. Having the right to rejoin, the plaintiff offered to prove by one Josiah Black, that a few days after the alleged sale by plaintiff to defendant, the latter said in a conversation with the witness, "that he had the six head of cattle, and that the market in Troy had got so dull that he was going to drive them to some point on the railroad to sell." The court refused to permit the plaintiff to introduce these declarations of the defendant, "unless the plaintiff would put defendant back on the stand and ask him if he had ever had such a conversation with the witness." The plaintiff duly excepted to this ruling and now assigns it as error.

W. D. ROBERTS, for appellant. — The evidence offered was not for the purpose of *impeaching* defendant; it was but proof of a deliberate admission by him of a material fact in issue. *Wittick's Adm'r v. Keiffer*, 31 Ala. 199; *Polly v. McCall*, 37 Ala. 20.

JOHN P. HUBBARD, *contra*. — The manner of introducing evidence and the order of its introduction lies in the discretion of the lower court. There is nothing to show any abuse of this discretion. The plaintiff by complying with the reasonable regulation of the court could have had the benefit of

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[Foster v. Westmoreland.]

Black's testimony. *Hutchins v. Childress*, 4 Stew. & Porter; 14 Ala. 552; *Borland v. Mayo*, 8 Ala. 104.

JUDGE, J. — Our understanding of the evidence, as it is set out in the bill of exceptions, is that the declarations of the defendant were permissible as rebutting testimony. The court therefore had not the discretion to impose as a condition to their introduction, that the plaintiff should first examine the defendant as to whether he had ever had such a conversation.

Let the judgment be reversed and the cause remanded.

Foster v. Westmoreland & Trousdale.

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Attachment for Rent.

Landlord's remedy for collection of rent; who cannot pursue. — The statutory provisions giving the landlord a lien on crops grown on the rented premises, and a remedy by attachment, to be levied on the crop, &c., cannot be pursued by one to whom he transfers the rent note.

APPEAL from Law and Equity Court of Lawrence.

Tried before WM. COOPER, Esq., an attorney of the court, the presiding judge being incompetent.

The payee of a note executed by appellant for rent of land transferred it by written indorsement to the appellees Westmoreland and Trousdale. They, on the ground that appellant had removed a portion of the crops grown on the rented premises, without the consent of the landlord, sued out an attachment which was levied on cotton grown on the premises. The appellant filed several pleas in abatement, alleging in substance that he was not and never had been tenant of the plaintiffs; that the plaintiffs at the time of suing out the attachment were not his landlords, and that they were mere assignees of the rent note. The court sustained a demurrer to these pleas, and on the trial permitted the indorsement on the note to be read in evidence to the jury. The appellant having duly excepted now assigns these rulings as error.

E. H. FOSTER and WATTS & WATTS, for appellant. — The remedy is purely statutory; is in derogation of the common law, and must be confined to the particular cases mentioned in the statute. *Brickell Digest*, p. 469, § 6, vol. 2.

O'NEAL & PHELAN, *contra*. — The object of the statute is to secure the rent to whomsoever due. If this landlord's transferee

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has not the rights he had, the rent note loses greatly its value. See *Fielder & Sessions v. Simmons*, 46 Ala., and cases cited.

JUDGE, J. — The provisions of the Revised Code which give to the landlord a lien on the crop for the year's rent and a remedy for its collection, by the levy of an attachment on the crop, authorizes the remedy in favor of the landlord alone, and it will not lie in favor of the assignee or transferee of the debt. The remedy given by the statute is a proceeding *in rem*; and being exclusively statutory, the statute giving it will not, by construction, be extended beyond its terms. *Dumas, administrator, v. McLoskey*, 5 Ala. 239.

The rulings of the court below having been in conflict with this opinion, the judgment must be reversed and the cause remanded.

McGehee v. The State.

Indictment for Murder.

1. *Immaterial averment; what need not be proved.* — An allegation in the indictment that the defendant is "a freedman," is mere surplusage, and should be disregarded. That fact, under our laws, is neither descriptive of the fact or degree of the crime nor material to the exercise of jurisdiction.

2. *Bill of exceptions; construction of.* — Where the bill of exceptions states that "the defendant requested the following charges in writing, which the court refused, and to the refusal of the court to charge as requested the defendant duly excepted," the ruling of the court below will be upheld, if any one of the charges requested is erroneous.

APPEAL from Russell Circuit Court.

Tried before Hon. J. E. COBB.

The opinion states the case.

LYMAN MARTIN, for appellant.

JOHN W. A. Sanford, Attorney General, *contra*.

BRICKELL, C. J. — The indictment charges that "Andrew McGehee, a freedman, unlawfully and with malice aforethought, killed Berry McMakin." On the trial the State offered no evidence in support of the averment that the accused was a freedman, and he requested several charges, affirming in effect that if the State had failed to prove the averment, he was entitled to a verdict of acquittal. These charges were refused and an exception reserved.

We can perceive no reason for the averment. It is wholly unnecessary, and has no legal effect. If such is the status of the accused, his offence is not thereby aggravated or mitigated,

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and in legal contemplation he is not distinguishable from a freeman. The averment is therefore wholly immaterial, and should be disregarded. Bish. Crim. Pro. § 229-35. Surplusage in an indictment, or in a civil action, sometimes increases the proof the pleader is bound to make, and though the averment is wholly unnecessary, if the proof is variant from it, the variance is fatal. In an indictment this occurs whenever the averment is descriptive of the fact or degree of the crime, or is material to the jurisdiction. 1 Greenl. Ev. 365; 1 Whar. Am. Cr. Law, § 680. The illustration of this rule, or more properly speaking of this exception to the general rule, that an immaterial averment may be rejected as surplusage, most often found in the text-books, is the averment of the color of a horse stolen. The color is immaterial and yet as it is descriptive of the thing stolen, the subject matter of the offence, it cannot be rejected as surplusage. Thereby the identity of the thing stolen is fixed. The case of *Felix v. State* (18 Ala. 720), is also an illustration of the description. The indictment was for murder, and the party slain was averred to have been a *free negro*, while the proof showed him to have been a *mulatto*. The variance was deemed fatal. The description was of the slain, and the personal identity could be fixed only by proof corresponding to the averment. The averment that the accused was a freedman, is not descriptive of any element of the offence imputed to him. It is not at all essential to the jurisdiction of the court, and should be regarded of no more importance or force than the addition of yeoman, farmer, gentleman, or other designation, employed in a common law indictment. When these were employed at common law, the plea of not guilty was an admission of the description, as it was, that the name imputed to the defendant was his true name. The court did not therefore err in refusing the charges affirming that it was material to make proof of this averment.

The bill of exceptions recites all the evidence offered, and proceeds: "The defendant requested the court to give the following charges in writing, which the court refused, and to the refusal of the court to charge as requested, the defendant excepted." Then followed charges numbered from one to four inclusive, on three of which we have already passed. The remaining charge is numbered *first*, and is in these words: "Unless the evidence against the defendant is such as to exclude to a moral certainty every supposition or hypothesis but that of his guilt, the jury should find the defendant not guilty."

A bill of exceptions is construed most strongly against the party excepting, and if it will admit of two constructions, one of which will reverse, and the other support the judgment, the latter construction will be adopted. 1 Brick. Dig. 251, § 126-

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23. A reasonable construction of the bill of exceptions is, that the charges requested were requested not separately, but as a whole. Adopting this construction, if any one of the charges is erroneous, there was no error in refusing the whole. A party, to place the court in error, must request charges, as he is entitled to have them given, and is not permitted to devolve on the court the duty of altering, reforming or modifying them. 1 Bric. Dig. 339, § 63. If several charges are combined and requested, each must be correct, or the whole may be refused. The court is not bound to separate them, and distinguish the legal from the illegal. Three of the charges we have decided asserted an incorrect legal proposition. It follows, if the charge quoted asserted a correct legal proposition, and was not abstract, the court did not err in refusing it, when asked in combination with these.

A bill of exceptions must distinctly point out the error of which complaint is made. The exception here is general to the refusal of all the charges, and not to a refusal of the charges as separate propositions. The manner of reserving the exception sustains the construction we have placed on the bill. Independent of this consideration, the exception reserved being general to the refusal of all the charges, cannot be entertained, if any one of the charges was erroneous. In such case, the exception does not with reasonable certainty point out the error of the court.

The charge requested is identical with a charge which this court, in *Mose v. State* (36 Ala. 211), and in *Joe v. State* (38 Ala. 422), declared asserted a correct legal proposition. In the light of the analysis and explanation of it, in *Mose v. State*, its correctness cannot be questioned. The supposition or hypothesis inconsistent with the defendant's guilt, which the evidence must exclude, is not a mere possible hypothesis, the creature of speculation, or of the imagination, but a reasonable hypothesis, arising out of the evidence. In every criminal case, it is not enough that the tendency or preponderance of the evidence shows the guilt of the accused; it must go further, and exclude the reasonable supposition of his innocence. 3 Greenl. Ev. § 29. This is the proposition embodied in the charge, according to the case of *Mose v. State*. The charge would have less tendency to mislead the jury, if it asserted that the evidence must exclude every reasonable hypothesis of innocence. When requested in this form, as a separate charge, it was given by the court. In this form, its meaning and effect is not variant from that in the form in which it was refused. We do not affirm that if the charge had been refused as a separate proposition, and an exception distinctly reserved to its refusal, the error of its refusal would have been cured by the charge

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subsequently given. Under the statute (R. C. § 2756), and the construction it has received, we would be precluded from declaring the error cured. *Polly v. McCall*, 37 Ala. 20; *Carson v. State*, January term, 1874. As, however, the appellant has had the full benefit of the charge, we are less reluctant to adopt the construction we have given the bill of exceptions.

There is no error in the record, and the judgment must be affirmed.

Summerhill et al. v. Tapp.

Bill in Equity to enjoin Judgment at Law.

1. *Suretyship; what does not create presumption of.* — The order in which the makers sign a promissory note, of itself raises no presumption of the relation of principal and surety between them; as between themselves, this may be shown by parol, but not to the prejudice of a stranger unless he had notice.

2. *Surety; what will not discharge.* — Mere passiveness or delay on the part of the creditor, in the absence of any direction to proceed, to enforce his legal remedies — *e. g.*, as where, before levy, he suspends execution — will not discharge the surety.

APPEAL from Chancery Court of Lauderdale.

Heard before Hon. R. L. WATKINS.

The facts are sufficiently stated in the opinion.

KEYES & JONES, for appellant.

McFARLAND, *contra*.

BRICKELL, C. J. — The equity of the bill, if it presents a case for equitable interference, rests on two facts, viz; that the complainant, Horace Summerhill, was the surety of Ira Arnold, on the note which is the foundation of the judgment sought to be enjoined; and that the respondent Tapp, the plaintiff in the judgment, stayed, without the consent of the surety, an execution which had been levied on property of the principal, of sufficient value to satisfy it, and that the principal has since become insolvent. The bill distinctly avers the suretyship, and the answer as positively denies it. The *onus* of proving the fact was therefore cast on the complainants. The evidence does not support the bill. The complainant Horace, in his deposition, affirms the fact, but the respondent denies it in his evidence, and avers he received the note from Summerhill, and advanced him the money for it, having no negotiation or transaction with Arnold. If there is evidence that Arnold's name was first in the order of signatures to the note, it is slight, and if the fact was expressly proved, the presumption of suretyship

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would not arise. All who sign a promissory note, joint, or joint and several on its face, are esteemed joint, or joint and several promissors, unless the note expresses that they bear another relation. Chitty on Bills, 529. Parol evidence is admissible in such case to show their true relation. *Br. Bank Mobile v. James*, 9 Ala. 949. This parol evidence must establish that by an agreement between the parties, when the note was made, some other relation between the makers than that which the law imputes to the form and terms of the note, was understood. If a stranger to the note is to be affected by the agreement he must have had notice of it.

The evidence fails to establish the other fact essential to the relief sought, that there was by the plaintiff in the execution, a suspension of it, to the prejudice of the surety. Mere passiveness on the part of a creditor, a mere failure to prosecute legal remedies, will not operate to discharge a surety. The creditor is not bound to active diligence, except at the request of the surety. The suspension of execution, if any is proved in the case, was prior to the levy. It has been several times decided by this court, that a direction by the creditor to suspend proceedings on an execution against the principal debtor, does not discharge the surety, no levy having been made. *Wilson v. Bank of Orleans*, 9 Ala. 847; *Hetherington v. Br. Bank Mobile*, 14 Ala. 68; *Royston v. Howie*, 15 Ala. 809; *Sawyer v. Bradford*, 6 Ala. 572; *State Bank v. Edwards*, 20 Ala. 512.

The chancellor correctly dismissed the bill, and his decree must be affirmed.

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Application for Mandamus.

1. *Constitutional law.*—Section 17 of the act to “establish the city court of Eufaula” contains no provisions not warranted by the subject of the act as expressed in its title; such an act necessarily including the jurisdiction to be conferred upon the court, the manner of its exercise, and the parties who may invoke it.

2. *Legislature ; what not exercise of judicial power by.*—The legislature may, without exercising judicial power, declare what causes “shall” entitle a party to transfer a case from one court to another of coördinate jurisdiction, so long as it leaves the ascertainment of such cause for judicial determination.

THIS was an application for a *mandamus* to compel the judge of the Ninth Judicial Circuit (Hon. H. D. CLAYTON) to transfer the trial of an indictment against petitioner pending in the circuit court to the city court of Eufaula. The facts

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upon which the application was based are set forth in the opinion.

TONEY & GOODE and J. M. BUFORD, for petitioner.

S. H. DENT, *contra*.

BRICKELL, C. J. — An indictment having been presented against the petitioner in the circuit court of Barbour county, at the fall term, 1874, during the term he applied for a change of venue, or, more properly speaking, a transfer of the cause, from the circuit court to the city court of Eufaula. The application was refused, and he now moves this court for a *mandamus* to compel the circuit court to make the order of transfer. The right to the transfer is rested on the seventeenth section of an act of the general assembly, approved February 14, 1870, entitled, "An Act to establish the city court of Eufaula," which declares "that whenever an indictment shall be pending in said city court against any person residing west of range twenty-eight (28) in Barbour county, upon application of such person, the venue in such case shall be changed to the circuit court of said county; and whenever an indictment shall be pending in the circuit court of Barbour county against any person residing east of range twenty-seven (27) in said county, upon application of such person, the venue in such case shall be changed to the said city court." Pamph. Acts, 1869-70, p. 109. The petitioner averred his residence east of range twenty-seven in said county, and it was admitted, and thereupon claimed the transfer, which was refused. The sixth section of the act confers on the city court of Eufaula concurrent jurisdiction with the circuit court of Barbour county of all offences against the criminal law committed in said county. The venue of the offence charged against the petitioner was the county of Barbour. Though the statute speaks of a change of venue, it is not strictly speaking a change of venue, but, preserving the venue, a change from one court to another of equal and concurrent jurisdiction. The statute is mandatory; it commands the transfer to be made, when the application is made and the fact of residence exists. Nothing is left or permitted to judicial discretion, the fact being ascertained.

It is insisted, however, the statute in this respect is unconstitutional. The constitutional provision supposed to be offended is the clause of the second section of the fourth article, which declares, "each law shall contain but one subject, which shall be clearly expressed in its title." The title of the act under consideration is, "An Act to establish the city court of Eufaula." The subject of the act necessarily embraces the

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jurisdiction which the court established shall exercise, the parties who can invoke, or who are subject to that jurisdiction, and the mode in which the jurisdiction shall be called into exercise. The court would be powerless, and it would be valueless to the community, unless these were defined with more or less particularity in the law of its creation. The degree of particularity which shall be observed in their definition rests in legislative discretion. The constitutional mandate is obeyed when the title expresses the subject and no provisions incongruous therewith are incorporated in the body of the statute. As was said by this court in *Ex parte Pollard* (40 Ala. 99), "the object of the constitutional provision was to prevent deception by the inclusion in the bill of matter incongruous with the title. The evil contemplated was not the generality and comprehensiveness of titles. Those faults do not tend to mislead or deceive." Whenever there is a natural and proper relation of the provisions embodied in a statute to the subject expressed in the title, the Constitution is not violated. We cannot conceive of a case in which such relation more clearly exists than in the provisions of the statute under consideration. A court is established having concurrent jurisdiction with another in the same territorial limits. That convenience of parties and witnesses, and a more efficient administration of the law, would often be promoted by the transfer of causes from the one court to the other, would naturally suggest itself to the legislative mind, and a provision therefor would almost of necessity be incorporated in the statute creating the last court. We do not doubt the statute in this respect is strictly constitutional.

It is said, however, the legislature in this section assumes judicial power; that it determines what fact shall authorize the transfer provided for, and *commands* the transfer, leaving nothing to judicial discretion. It is sufficient to say that it is within legislative competency to declare on what ground a party may elect a transfer of his cause from one court to another of equal and coördinate jurisdiction; and that when the election is made, judicial power is exercised in determining the fact of such election, and the existence of the ground on which it is based. All laws are commands addressed as well to judicial tribunals as to individuals, and obedience is exacted from the one as well as the other.

The petitioner was entitled to the transfer of his cause as prayed for, and the circuit court erred in refusing to grant it. The issue of a rule *nisi* has been waived, and a consent filed that a peremptory *mandamus* should issue, if such was the opinion of this court, the peremptory *mandamus* must therefore issue, as prayed for by the petitioner.

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*Ex Parte State of Alabama.**Application for Mandamus.*

1. *State ; laws authorizing suit against, confer mere privileges.* — Statutes permitting the State to be sued are mere matters of grace, conferring privileges, not rights, which it may withdraw at pleasure.

2. *Same ; repeal of law authorizing, effect of, on pending suit.* — The repeal of the law authorizing suits against the State strips a court, in which such a suit is pending, of all jurisdiction to proceed further in the cause.

3. *Section 16, Art. 1 of Constitution ; not mandatory.* — Section 16 of Art. 1, of the Constitution which declares that "suits may be brought against the State in such courts as may be by law provided," is not to be construed as imposing a duty upon the legislature to pass laws authorizing such suits.

THIS was an application by the attorney general, on behalf of the State, for *mandamus* to compel the judge of the circuit court of Montgomery to strike from the docket a case therein pending, wherein one W. A. C. Jones was plaintiff, and State of Alabama defendant, on the ground that the law authorizing suits against the State had been repealed, — a like motion to strike the case from the docket having been overruled by the circuit court.

In his return to the rule *nisi* the circuit judge answered that the plaintiff, a citizen of the State, brought suit against it in said circuit court on the 14th of November, 1873, upon a contract alleged in the complaint to have been made by the State with him in 1871 ; that the attorney general and other counsel, employed to defend, appeared on behalf of the State, and the cause was continued by consent of parties to the December term, 1874, and was thus pending when the act of December 18, 1874, was passed ; that holding that this act had no application to Jones's suit, he overruled the motion of the attorney general to strike it from the docket. The attorney general now moved for a peremptory *mandamus*.¹

JOHN W. A. SANFORD, Attorney General, with whom was R. M. WILLIAMSON, for the motion. — I. Alabama is a sovereign State, and the sovereign is not bound by general words

¹ The following is the act referred to : —

"AN ACT.

"To repeal sections 2534, 2536, 2571, and 3323 of the Revised Code of Alabama.

"SECTION 1. *Be it enacted by the General Assembly of Alabama*, That sections numbered two thousand five hundred and thirty-four (2534) ; two thousand five hundred and thirty-six (2536) ; two thousand five hundred and seventy-one (2571), and three thousand three hundred and twenty-three (3323), of the Revised Code of Alabama be and the same are hereby repealed.

"SECTION 2. *Be it further enacted*, That all laws and parts of laws in conflict with the provisions of this act or which make any provisions for bringing or conducting suits against this State, be and the same are hereby repealed.

"Approved December 18, 1874."

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in a statute, but is, by express terms, or by necessary implication. *The United States v. Hewes*, Crabb's Reps. 307 *et seq.* Consequently the general laws which provide remedies for the redress of wrongs or the enforcement of rights, do not authorize suits to be instituted against the State. *Mulford's Nation*, 129-130; *Cooley Const. Limitations*.

II. No sovereign can be sued without its consent. This must be clearly given. It is a grace or favor granted to the citizen, and is revokable at the will of the sovereign. *Beers v. Arkansas*, 20 How. 527; 20 Ib. 530. The privilege of bringing suits against the State, cannot be considered a vested right, or a contract; and its revocation does not infringe any provision of the State, or federal Constitution. *Cooley Const. Lim.* pp. 362-383; *Sanders v. Ogden*, 12 Wheat. 332-357; *Ex parte Pollard*, 40 Ala. 77-92, and authorities cited.

III. Upon the consent of the sovereign to be sued depends entirely the jurisdiction of the court, and its withdrawal deprives the court of jurisdiction, even over the suits then pending. 1 Conn. 182; 8 Pet. 444-88; 9 How. 389; 2 Texas, 611; 7 Wall. 154; 7 Ib. 506; 3 Dall. 378; 2 Pet. 380; 2 Ib. 492-523; 5 Cranch. 281; 1 Binney, 601; 3 Ohio, 553-76; 1 Hill (N. Y.), 330; *Rex v. Justices, &c.* 3 Burr, 1456. The consent to be sued by her own citizens heretofore given by the State, was withdrawn by the act approved December 18, 1874. Therefore a writ of *mandamus* should be granted, commanding the suit of the plaintiff against the State to be dismissed.

H. A. HERBERT, SAMUEL F. RICE and THOS. H. WATTS, *contra*. — I. The Constitution embodies in the declaration of rights the carefully arranged words: "That suits may be brought against the State in such manner and in such courts as may be by law provided." By placing it there, the framers of the Constitution meant to confer a *right* to sue in *some court*. Before the adoption of the present Constitution and that of 1865, it had been broadly laid down that no such right existed; that it was mere matter of grace on the part of the sovereign. That the State had power to permit suit against it, has never been denied. The declaration in the "Bill of Rights" was not intended therefore to confer the authority to allow such suits to be brought. Their office and intent were to create and affirm the *right* of suit and place it "upon the footing of fundamental, absolute rights." These were intended as enduring evidence of the *sovereign's consent* to be sued — beyond the power of recall by any of the sovereign's agents or servants, the executive, legislative, and judicial branches of government.

II. The "*manner*" of bringing suit, is the only thing over which the legislature is vested with power. The *right* to sue

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is given by the Constitution. That instrument declares that "courts shall be open . . . every person shall have a remedy by due process of law," &c. Now until some time is fixed by the legislature for holding those courts, this provision is not self executing. Yet when these courts are established, *and a time fixed for holding them*, could any court sustain a law which repealed *all the acts* authorizing courts to hold terms, and providing no other time for holding them? The direct effect of the act would be to destroy that portion of the Constitution referred to. Where acts have been passed to effectuate constitutional rights and provide a means of exercising and enforcing them, the legislature cannot *entirely repeal* the acts giving such remedies, and substitute none others in their stead; for this would be to destroy the Constitution. Laws having been made at the command of the Constitution, to give operation to a right it creates, any legislation working an entire repeal, is, in effect, not a repeal of a mere legislative act, but the repeal of a constitutional right.

III. "A vested right of action, where it springs from contract on the principles of the common law, it is not competent for the legislature to take away." Cooley's Cons. Lim. (3d ed.) p. 362 and notes; 16 Wallace, 690; 48 Ala. 433; 3 Dallas, 419; 7 English (Ark.), 321. It is also a general principle that jurisdiction, once vested, is not divested, although a state of things should arise in which original jurisdiction could not be exercised, nor although it should appear that the judgment rendered will be unfruitful or unproductive to the plaintiff obtaining it. *U. S. v. Schooner Little Charles*, 1 Brokenborough 347-355 (per Marshall, C. J.). That the real source of the circuit court jurisdiction is the State Constitution is demonstrated by the opinion of MARSHALL, C. J., in *Durousseau v. U. S.* 6 Cranch, 312-14.

IV. The case of *Beers v. Arkansas* (20 Howard), is not adverse to the views contended for. It decided simply the *effect of a change of remedy* in the right to sue, and not the abolition and destruction of the right. The Constitution of Alabama is very different from that under which the Arkansas case arose. The Arkansas Constitution did not by its terms give the *right* to sue the State; it merely directed the legislature to declare by law and in what manner suits may be commenced. Until the legislature spoke, the *right* did not exist. In Alabama, the Constitution itself gave the right.

V. The act can have no retrospective construction — its only constitutional provisions do not require it. *Dash v. Van Kleeck*, 7 Johns; 20 Michigan, 298. Its second section is unconstitutional — the title does not cover its provisions.

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BRICKELL, C. J. — The Constitution of 1819 declared, "The general assembly, shall direct, by law, in what manner, and in what courts, suits may be brought against the State." Cons. Art. 6, § 9. In 1820 and 1827, statutes were enacted, investing the circuit court with jurisdiction of suits against the State, when instituted by a citizen of the State, prescribing the mode in which they should be commenced, conducted, and defended, and the mode of obtaining satisfaction, if judgment was rendered against the State. Clay's Dig. 339, §§ 143, 144, 145, 146. These statutes were substantially embodied in the Code of 1852, forming §§ 2138, 2139, 2140, 2172, thereof, and were carried into the Revised Code, forming §§ 2534, 2535, 2536, and 2571 thereof. In *Ex parte Green & Graham* (29 Ala. 52), the judge delivering the opinion asserted that these statutes did not authorize a suit in chancery against the State. The other judges, not deeming a decision of the question necessary in that case, expressed no opinion thereon. The doubt as to the liability of the State to be sued in chancery, thus created, led to the enactment of a statute investing the chancery courts with jurisdiction of suits by and against the State, when a citizen of the State, or a domestic corporation, was the adverse party. This statute forms § 3323 of the Revised Code.

At its present session the general assembly repealed the sections of the Revised Code authorizing suits either in the circuit court, or in the court of chancery against the State. The act is entitled, "An Act to repeal sections 2534, 2536, 2571, 3323, of the Revised Code of Alabama." The first section expressly repeals the sections named in the title. The second section declares all laws and parts of laws in conflict with the provisions of this act or which make any provisions for *bringing or conducting suits against this State be and the same are hereby repealed*. Section 2535 of the Revised Code which imposed on the solicitor of the circuit in which a suit was pending against the State, the duty of defending it, was not expressly repealed. There was no necessity for its repeal, as the office of solicitor of the circuit had been by the Constitution abolished, and it was of consequence incapable of operation.

At the passage of this repealing statute a suit was pending in the circuit court of Montgomery, brought against the State, by one W. A. C. Jones, a citizen of the State. After the passage of the statute, the attorney general moved the circuit court to strike the cause from the dockets. The motion was overruled, and the State by the attorney general now moves the court for a *mandamus* compelling the circuit court to grant the motion it overruled.

It is said in Bacon's Abridgment, "The king cannot be sued by his subjects by writ, for he cannot issue a command to him-

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self." 8 Bac. Ab. 106. "The King," said Chief Justice Markham, to Edward IV., "cannot arrest a man upon suspicion of felony or treason, as any of his subjects may, because if he should wrong a man by such arrest, he can have no remedy against him." 1 Hallam's Const. Hist. 385. There were petitions allowed, by which the subject could obtain redress or restitution from the crown of real or personal property, or proceed for the recovery of a private debt. But for an obligation created by act of parliament, the faith of the parliament alone was trusted, and to that an appeal for performance must have been made. For the enforcement of such an obligation, it is not believed, it was ever supposed in England, there was or could be a judicial remedy. However this may be, the principle recognized in this country, as to the several States of the Union, is that expressed by C. J. TANEY, in *Beers v. State of Arkansas*, 20 How. 529. "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a party defendant in a suit by individuals or by another State." No liability or obligation can rest upon the State, not created by law. No officer of the State can by his act without authority of law, create such liability or obligation. In *Vandyke v. State* (24 Ala. 81), it was declared a payment to the comptroller of moneys due the State, can only be ratified by the sovereign power of the State, the law-making power, and of consequence that a suit against him, in the name of the State, for the recovery of such moneys, instituted by direction of the governor, was not a ratification, and could not be maintained. All obligations or liabilities resting upon the State, being creations of the legislative power of the State, it is the good faith of the State alone, on which reliance is placed to perform the obligation, or discharge the liability. Legal remedies, or their efficacy in enforcing the obligation or liability, are not contemplated as in cases of contracts between individuals. These are vain and useless against the State without the concurrence of the legislative power. Statutes are often passed permitting suits against the State. Such statutes are matters of grace, confer privileges,—they do not create rights, and are always construed like other statutes, conferring privileges or exemptions on the citizen. The power to withdraw is commensurate with the power to confer, and when the privilege is withdrawn, the citizen is remitted to the condition in which he stood when it was conferred. Many illustrations of the principle are given by Judge Cooley, in his work on Constitutional Limitations, and among others he mentions a statutory right to have cases reviewed on appeal which may be taken

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away, by a repeal of the statute, even as to causes which had been previously appealed. Cooley's Const. Lim. 382. The principle has often been applied to suits against the State. In the case of *Chisholm Ex'rs v. State of Georgia* (2 Dallas, 419), the supreme court of the United States decides that it had jurisdiction of a suit against a State, by a citizen of another State. The decision led to the adoption of the 11th amendment of the Constitution of the United States, declaring "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of any foreign State." When this amendment was adopted, the case of *Hollingsworth v. State of Virginia*, was pending in the supreme court, and the court unanimously declared it could not, after the adoption of the amendment, exercise any jurisdiction in any case, past or future, in which a State was sued by the citizens of another State, or by citizens, or subjects, of any foreign State. 3 Dallas, 378. The Constitution of Arkansas was in substance the same as our Constitution of 1819. "The General Assembly shall direct by law, in what courts and in what manner suits may be commenced against the State." The General Assembly of Arkansas made provisions for suits against the State. In reference to these, in the case of *Beers v. Arkansas*, *supra*, C. J. TANEY, said: "This permission (to sue the State) is altogether voluntary on the part of the sovereignty; it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it." A similar opinion was expressed in *Platenius v. State*, 17 Ark. 518. In *Huasaker v. Borden* (5 Cal. 288), it is held, that as a county is a mere political subdivision of the State, there is no right of suit against it, except as permitted by statute, and the permission could be withdrawn or denied at any time the legislature may think proper. The doctrine was reaffirmed in *Sharp v. Contra Costa County*, 34 Cal. 284. Under the influence of these authorities we must hold the statutes authorizing suits against the State conferred privileges on the citizen, — their repeal operated a withdrawal of the privilege, and the circuit court was without further jurisdiction to proceed in the cause it was moved to strike from the docket.

It seemed to be admitted by the counsel of the respondent, that such would have been the result, under the Constitution of 1819, but that the present Constitution confers on the citizen the right of suit, and therefore it was not competent for the general assembly by any enactment to impair or defeat this

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right. The present constitutional provision is, "that suits may be brought against the State in such courts as may by law be provided." Const. art. 1, sec. 16. The words of the present Constitution are less mandatory, and less adapted to the creation of a right, than were the words of the Constitution of 1819, if there is any real change in their signification. The present provision was first introduced into the Constitution of 1865. The provision of the Constitution of 1819 had been incidentally considered in two cases in this court, [*White v. Governor*, 18 Ala. 767; *Ex parte Greene & Graham*, 29 Ala. 52,] and it was said it was made the duty of the legislature to direct in what manner and in what courts suits should be brought against the State. If any change in the constitutional provision can be supposed to have been intended by the change in the phraseology, we would be inclined to the opinion, the change was superinduced by these decisions, and the intent was not to create a duty on the legislature, but to confer a discretionary power coextensive with that recognized by the general "jurisprudence of all civilized nations." Nor can any importance be attached to the place in the present Constitution in which the provision is found. It is found under the title "Bill of Rights." A bill of rights, as recognized in American constitutions, is declaratory of the general principles of republican government, and affirmatory of rights inherent in the people and the individual citizen, not surrendered to, and incapable of invasion by the government the Constitution ordains and establishes. It matters not whether these are declared by the Constitution a bill of rights, or in what part of the Constitution they may be found. It is these which are of controlling importance in the construction of the Constitution and the determination of governmental power. Incorporating in the Constitution a provision not connected with these under the title of "Bill of Rights," will not convert it into a right akin to these. The Constitution of the United States has no title of "Bill of Rights," yet the ten amendments first made to it have all the force and effect of, and were intended, as such. They are esteemed of the same importance as the most formal bill of rights in a State Constitution. In the Constitution of 1819, under the title of "General Provisions," was found the provision that in prosecutions for libel of public officers the truth of the matter could be given in evidence, and that the jury had the right to determine the law and fact. This provision is now under the title of "Bill of Rights." It was not entitled to less consideration because of the place in which it was found in the Constitution of 1819, nor does it derive any additional potency from the place it now occupies. It conferred and now confers the full and free right to investigate and make public the official

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conduct of public men, without the terrors of a prosecution except for falsehood. It is the subject, the nature of a constitutional provision alone, that fixes its character as belonging to the class of rights usually expressed in the bill of rights, and which are chiefly derived from *Magna Charta*, and the petition of right.

A peremptory *mandamus* will be awarded commanding the circuit court to strike the cause from its docket.

Key et al. v. Jones, Administrator.

Bill for Account of Advancements, Final Settlement and Distribution.

1. *Chancery ; jurisdiction to decree account of advancements.* — A court of chancery taking jurisdiction of an administration, may, when a distribution to heirs or next of kin becomes necessary, decree an account of advancements and exercise the jurisdiction conferred by statute on the probate court.

2. *Election to retain advancements ; what does not establish.* — Verbal declarations of a distributee after the death of the intestate, that he had received a full share and would retain it and not claim any more, and proof that partial distributions were made by him, as administrator of the intestate, in which he made no claim to share, do not, of themselves, establish an election to retain advancements and waive any claim to share in the distribution.

3. *Same.* — Whether the statutory mode of making such election precludes all others is not decided ; but such election, if it can arise by matters *en pais*, must be by clear, unequivocal acts, with a full knowledge of all the circumstances and the party's rights. Mere intention to elect, casual declarations or loose conversations will not suffice, especially when not acted on to the prejudice of another.

4. *Administration account ; what no part of.* — Where the intestate's lands are sold under written agreement of the heirs, part of the price being paid in cash and the remainder in notes made payable to, and received by the heirs in payment of their respective shares, the proceeds of such sales or notes are not proper matters of the administrator's accounts, and he is not entitled to commissions thereon.

5. *Administrator, compensation of ; by what law governed.* — The administrator's compensation is governed by the law of force at the time the services were rendered and not by the law as it stood at the time of his appointment or settlement.

6. *Constitutional law.* — The "act to increase the compensation of executors, administrators, guardians, and county commissioners in Lauderdale county," approved February 19, 1865, is not obnoxious to that part of section 2, Art. IV. of the Constitution of 1865, which declares that "each law shall embrace but one subject, which shall be described in the title."

7. *Section 2704 R. C. ; to what applies.* — Section 2704 R. C. applies to a reference before the register, as well as to other proceedings in the chancery court.

8. *Same ; when party incompetent witness under.* — A party in interest is not a competent witness to prove admissions or declarations made by a decedent, or transactions had with him in his lifetime, when the purpose of the evidence is to diminish the rights of a decedent or those claiming in succession to him.

9. *Administrator ; when not liable for Confederate currency perishing on his hands.* — An administrator, exercising diligence, prudence and good faith in the acceptance of Confederate currency in payment of a debt due his intestate, should be allowed a credit for it, although the currency perishes on his hands, if he has not commingled it with his own funds or been guilty of negligence or bad faith in not paying it out.

APPEAL from Chancery Court of Lawrence.

Heard before Hon. R. S. WATKINS.

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This was a bill in equity filed by A. H. Jones as administrator *de bonis non* of the estate of Nathan Boddie deceased, against Boddie's heirs at law and the children of a deceased heir, James S. Boddie (upon whose estate Jones also administered), praying a settlement of the administration in chief and of the administration *de bonis non*, and an account of advancement made by the intestate in his lifetime to his heirs and distributees, and of payments made to them by the several administrators and for a final distribution. The errors assigned grow out of exceptions to the report of the register stating accounts. These exceptions were overruled, and a final decree rendered confirming the report and decreeing a settlement and distribution on the basis thereof.

The material facts of the case may be stated as follows: Nathan V. Boddie died intestate in 1861, leaving a large estate consisting of lands, slaves, and other personal property. Two of his sons, James S. and Nathan V. were appointed and qualified as joint administrators, giving a joint bond. They returned an inventory and appraisal of the estate, and obtained an order to divide the slaves among the heirs and to sell the perishable property, which was done on 29th January, 1862, and duly reported to, and confirmed by the probate court. Owing to the operation of the armies during the late war, no record of these orders was preserved, but afterwards, on the 29th of January, 1863, a decree was entered *nunc pro tunc* confirming the action of the administrators in the premises.

In the petition for the order of distribution of the slaves, which was dated January 20th, 1862, and signed by both the administrators, James and Nathan Boddie, it is stated that the following named persons, giving the names of the heirs, are the heirs and entitled to share in the distribution, "except one of your petitioners, James S. Boddie, who declines a participation in said slaves."

On the 27th of February, 1862, Nathan V. Boddie resigned, and James S. was continued in the administration as sole administrator. He made an annual settlement on the 23d of March, 1863, on which settlement a balance of \$6,974.39 was due the estate. In 1863 he obtained an order to rent the lands and to sell some cotton, and on the 25th of November, 1865, made an annual settlement on which a decree was rendered in his favor for \$406.93. About the first of December of that year, in pursuance of a written agreement of the heirs, all of whom were then of age, except one who has since ratified the agreement, James V. sold the lands belonging to the estate, and reported the sale to the probate court which duly confirmed the same. James V. continued in the administration until his death in August, 1866. On the 16th of September of that

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year, appellee, Jones, was duly appointed administrator *de bonis non* of the estate of Nathan Boddie, and also administrator of the estate of said James, and duly qualified under both appointments.

It is unnecessary, in the view which the court took of this cause, to notice in detail the agreement made between the heirs for a sale of the lands, nor to a subsequent agreement between them by which it was agreed to make certain deductions from the notes of the purchasers. The lands were sold for one third cash, and the remainder of the purchase-money payable in equal instalments in one and two years. The heirs divided the cash payment among them in proportion to their respective interests, and the purchasers' notes were made payable to and accepted by each of the heirs for his or their share of the deferred payments, some of the heirs becoming purchasers at the sale.

On the reference before the register, several of the distributees were examined, against the objection of the representative of James S. Boddie, to prove verbal declarations made by him in his life-time, for the purpose of showing an election to retain advancements and renounce all claim to share in the distribution. It seems from the testimony that before Nathan Boddie's death, he had put James in possession of a plantation called the "Donelson place," together with a number of slaves to work it, and James was for some time under the impression that he was entitled to retain the plantation, as well as the negroes. During this period, in the year 1862, he made declarations to the effect that he believed "he had a full share, and would hold his hand." He received no deed to the "Donelson place," and being advised that he could not retain it, said he would have his property valued and go into a division with the other heirs. Other similar declarations were proved. About this time he sold some cotton belonging to the estate, out of which he retained an heir's share, but before this he had sold another lot of cotton the whole proceeds of which he divided equally among the other heirs, saying that "the law must decide" as to his share, and "after finding out that he could not hold the Donelson place," paid rent for it.

In the register's report the land sale was introduced into the accounts of the administration, and Nathan V. Boddie was charged with \$5,971.25 purchase-money of land bought at the sale, made by agreement of the heirs, and also charged with the price of 24 acres of land in the tract purchased for which he had not paid or given notes. He excepted to these items of the report, but his objection was overruled.

The register also allowed James S. Boddie's administrator commissions on the amount of the sale of the lands, and refused

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to charge him for the purchase-money of the lands at the original price at which they were sold, but did charge him the amount to which the heirs agreed the price should be reduced. The allowance of these commissions was excepted to, but the chancellor overruled the objection, as also an exception to the refusal to charge the administrator with the full amount of the purchase-money of the lands. An account was taken of the advancements made to James S., and, on account being taken of them, he was allowed to share in the distribution of personal assets. This forms the subject of an exception to the report, which was overruled.

The register found that there was a balance due James S. Boddie on a settlement of his administration, and computed interest thereon to the final distribution. Exception on this point was taken but overruled by the chancellor. This balance originated not from disbursements in paying debts and expenses, but from overpayments to the distributees.

An exception to the allowance of commissions to the administrators on the appraised value of the property distributed, as provided by the act of December 7, 1861, now § 2162, R. C., was overruled, as also an exception to the allowance to the administrator for services rendered after the 19th of February, 1867, at the rate prescribed by that act.

The chancellor overruled an exception by Nathan V. Boddie to the charge against him of \$1,200 Confederate money, received from one Oates, as a payment on his distributive share. The facts in regard to this item are fully set forth in the opinion, and need not be here repeated.

The various rulings of the chancellor, in overruling the exceptions to the register's report, are now assigned for error.

WADE KEYES and R. O. PICKETT, for appellants. — 1. The proceeds of sale of the lands should not have entered into the administrator's account. The sale was not ordered or made in pursuance of any statutory power of the probate court, and the court obtained no jurisdiction whatever over the proceeds. The administrator did not act *virtute officii*, but merely as the agent of the heirs.

2. "A payment, a partial distribution, or a gift, made voluntarily and without any mistake of fact, is binding and irrevocable." 1 Story, Eq. § 111 *et seq.* James Boddie is clearly shown to have made distribution of assets of the estate voluntarily, without any mistake of fact, and with the purpose and intent to abandon, and with an actual abandonment of all right as a distributee to such assets. This bars him, independent of the doctrine of election, advancement, and *hotchpot*.

3. Nathan Boddie, upon the testimony, should not have been
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charged with the \$1,200 received from Oates. He never received it as an advancement. If he took it as administrator, the circumstances show the diligence and *bona fides* of the transaction. The ordinary rules protecting trustees should shield him, if he is sought to be made liable for his agency in collecting it.

4. The act of December 7, 1861, changing the compensation of administrators, did not have the force and effect of law until reenacted in the Code, and the services were performed long before that date. 43 Ala. 488; *Reynolds v. Taylor*, 43 Ala. 420. The "act to increase the compensation of executors, administrators, &c., approved February 19, 1867, violates the Constitution of 1865. It contains more than "one subject." Each of the different classes of officers mentioned constitutes a different subject.

5. The administrator is not entitled to interest on the balance due him originating from overpayment to distributees, even when the distributee can be compelled to refund, unless the court has in its control an interest bearing fund belonging to the distributee. 2 Williams on Executors, 1245.

O'NEAL & O'NEAL and W. B. WOOD, *contra*. — 1. The testimony clearly shows that James Boddie made no deliberate election. His declarations, relied on to prove it, were made under a mistake as to his right to retain the Donelson place, as well as the personal property. When he was advised of the mistake, he manifested an unmistakable intent to share in the distribution. He could not then be held to a full knowledge of the condition of the estate, and there is no proof to show that he actually knew the facts which would enable him to make a deliberate and intelligent election. He declined participation in slaves alone, when laboring under a mistake as to his rights. The facts do not show an election. 2 Yates, 302; 17 S. & R. 25; 2 Green (Ch.), 510; 1 Leading Cases in Equity, 237; 7 Dana, 6; 2 Richardson Equity, 237. The heirs have not been prejudiced by his acts, and the election, if actually made, under these circumstances, is not conclusive. 1 Vesey Sr. 400; 1 P. Wms. 365; 12 Vesey, 136; 13 Cal. 133; 2 Metcalf, 47; 4 Jones Eq. 178.

2. The allowance of interest to James Boddie's administrator for the balance found due on settlement was proper. 22 Ala. 343; *Ex parte Sallie Reavis*, June term, 1874; 7 Ala. 217.

3. The commissions allowed were governed by the law of force when the services were rendered. R. C. §§ 2161-2. The act of February 19, 1867, is clearly constitutional. The one

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subject there is much more definite than that passed on in *Robinson v. Falconer*, 46 Ala. 340.

4. The probate court confirmed the sale of the lands, and the proceeds of the sales was therefore a proper item in the administration account.

BRICKELL, C. J.—The first exception we propose to notice is one taken by all the appellants, viz.: that James S. Boddie, a son of the intestate, was permitted, on accounting for the advancements made him by his father in his life, to share in the distribution of the personal assets. The exceptants insist he had prior to the distribution elected to retain the advancements made him, and abandon all claim to any other or further share in the personal assets. The election is supposed to have been manifested by his verbal declarations, after the death of the intestate, that he had received a full share, and would retain it, and not claim any more; that partial distributions were made by him, as administrator of the intestate, in which he made no claim to share.

The Code provides the mode of bringing together all the personal estate of an intestate, including advancements he has made to his children, in order to a division according to the statute of distributions. Jurisdiction of controversies as to advancements is devolved on the probate court. The personal representative, or any party interested in the distribution, alleging on oath that an advancement has been made, can procure a citation to the heir or distributee alleged to have been advanced, requiring him to answer what, if any, advancements have been made him. If he answers, an issue can be formed on the answer, and judgment rendered declaring the amount and value of such advancement. If he fails to answer, it is *prima facie* evidence he has received his "full proportionate part of the estate." R. C. §§ 1904-1908. Thus a mode of ascertaining judicially the amount and value of such advancements, and a mode in which the heir or distributee may judicially manifest an election to retain the advancement and abandon all claim to a further distribution, is established. True, the statutes confer the jurisdiction on courts of probate only; but when a court of equity takes jurisdiction of an administration, it applies the law relating to administrations in the court of probate, proceeding according to its own practice. *Taliaferro v. Brown*, 11 Ala. 702; *Hall v. Wilson*, 14 Ala. 295; *Wilson v. Crow*, 17 Ala. 59. When, therefore, a court of chancery has taken jurisdiction of an administration, and a distribution to the heirs or next of kin becomes necessary, it may decree an account of advancements, and exercise the jurisdiction conferred by statute on courts of probate.

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A mode of requiring heirs and distributees to elect whether they will account for advancements they have received, or retain such advancements and waive all claim to further distribution, being thus provided by law, we do not say the election cannot be made by matter *en pais*; but if it can, it must be by plain and unequivocal acts, under a full knowledge of all the circumstances and of the party's rights. 1 Lead. Cases in Equity, 419; *Reaves v. Garrett*, 34 Ala. 558. A bare acquiescence, without a full and deliberate and intelligent choice, will not be an election. A mere intention to elect will not suffice; nor are loose conversations or casual declarations, expressive of such intention, to be weighed in determining whether an election has been made. *Reaves v. Garrett, supra*. Applying these principles to the facts found in the record, will not authorize a court to declare that James S. Boddie had made an election, which is conclusive on him, not to account for advancements made him, and share in the final distribution of the personal assets. When the declarations were made and the acts done, which are claimed operate an election, the time had not arrived when an election could have been compelled. No step had been taken to compel an account and ascertainment of advancements. He had not the means of making an intelligent election. No account had been furnished him of the advancements to his co-heirs and co-distributees. He may have had a general knowledge of such advancements, but he had not that knowledge which would have enabled him to make "a judicious and discriminating choice." His acts and declarations worked no injury to his co-heirs and co-distributees. On them they never acted, so that it would be unjust to them for him now to claim distribution. The equitable doctrine of election between conflicting and inconsistent rights is not intended to work forfeitures, but to promote equality and subserve justice. Therefore, compensation is often decreed when thereby complete justice can be done. 1 Lead. Cases in Eq. 401. The chancellor correctly ruled that the personal representative of James S. Boddie was, on accounting for advancements, entitled to share in the distribution.

The lands of the intestate were sold, under an agreement in writing between the heirs, for one third cash and the remainder of the purchase-money payable in equal instalments at one and two years. The cash payment was divided among the heirs, in the proportion of their respective interests in the lands, and the notes of the purchasers were made payable to and accepted by each heir for his or her respective shares of the deferred payments. The sale was reported to the court of probate, as had been previously reported the fact of the agreement for sale between the heirs. The court of probate had

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no jurisdiction over this sale. The report made to it was an idle ceremony, and any action thereon by that court was a mere nullity, entitled to no consideration. The purchase-money is introduced into the settlement of the administrations, and a grave controversy entered into as to whether the heirs, subsequent to the sale, had agreed to make certain deductions from the notes of the purchasers. The whole controversy is foreign to this suit, and it has served no purpose except to complicate the accounts, obscure the questions really at issue, and swell the record. The proceeds of the sales of the lands were in no sense assets over which the administrator in chief, or administrator *de bonis non*, had any power *virtute officii*. For them, in their representative capacity, neither they nor their sureties were responsible. It is only with money or property which an administrator is entitled to receive in his representative capacity that an account should be taken in settling his administration. *Pettit v. Pettit*, 32 Ala. 288; *Smith v. Smith*, 13 Ala. 329; *Ashurst v. Ashurst*, Ib. 753. There may be cases in which he wrongfully receives moneys, to which he is not entitled in his representative capacity; yet a court of equity will, on the ratification of his illegal act by the parties in interest, charge him with such moneys. This case does not belong to that class of cases. The chancellor, therefore, erred in overruling the exceptions to the report of the register because these sales had been introduced into the accounts of the administration, and because appellant Nathan V. Boddie was charged with \$5,971.25, purchase of homestead tract. No one of the heirs should be charged in this suit with their purchases of real estate. That is a private individual transaction disconnected from the administration.

The chancellor further erred in overruling the exception of the appellant Nathan V. to the report because he was charged therein with \$305.20, purporting to be for a quantity of land in the tract he purchased, in excess of the quantity for which he had given notes or made payments. He may be and is doubtless liable for this excess, but not in this suit.

The chancellor erred in overruling the exception because of the allowance to the administrator James S. Boddie of commissions on the sales of the lands. Commissions are compensation for services rendered by an administrator in his representative capacity, not for services he may render in performing an agreement made with and between the heirs.

The chancellor did not err in overruling the exception to the report because the administrator was not charged with a larger sum as proceeds of sales of lands. He should not have been charged at all.

The register ascertained that there was a balance due the

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administrator James S. Boddie on a settlement of his administration, and he computed interest thereon to the final distribution. This forms the subject of an exception to the register's report, which the chancellor overruled. This balance did not arise from the administrator exceeding the assets in his hands, in paying debts and expenses of administration, but it originated from overpayments to the several distributees. That the administrator is entitled to interest on this balance we do not doubt. Interest with us attaches as an incident to any moneyed debt or demand, and is compensation for the forbearance of such debt. *Hollingsworth v. Hammond*, 30 Ala. 668; *Whitworth v. Hart*, 22 Ala. 348. But he should not have been allowed this balance and the interest thereon as a credit in his general account. Each distributee should have been charged with so much of said balance as was an overpayment to him, and with interest thereon. The exception should therefore have been sustained.

In February, 1862, the administrator, under orders of the court of probate, made division and distribution of the slaves of the intestate. An exception was reserved to the report of the register, allowing the administrator commissions on the appraised value of the slaves. The exception was properly overruled. The compensation of an administrator or executor is dependent on the law in force when the services are rendered, not on the law existing when he is appointed or when he makes settlement. *Gould v. Hayes*, 19 Ala. 438. The act of December 7, 1861, now § 2162 of the Revised Code, allows the administrator the same commissions on the value of personal property distributed as is allowed him on disbursements.

On the 19th February, 1867, the general assembly passed an act entitled "An act to increase the compensation of executors, administrators, guardians, and county commissioners, in Lauderdale county." For services rendered after the passage of this statute the register allowed the rate of compensation it prescribes, to which an exception was taken and overruled. The exception rests mainly on the suggestion that the act violates the clause of the second section of the 4th article of the Constitution of 1865, providing "each law shall embrace but one subject, which shall be described in the title." The act is not liable to the objection. This constitutional provision received an interpretation in *Ex parte Pollard* (40 Ala. 77), which has since been accepted as authoritative and conclusive. The object of the provision, the court declared, was to prevent deception by the inclusion in a bill of matter incongruous with the title; to prevent the misleading of the general assembly, and the community, by the introduction into one act of matters

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foreign to each other. No part of this statute is not expressed in the title, and the matters to which it refers are not so alien to each other that they may not properly have been embraced in one act.

Against the objection of his administrator one or more of the distributees were permitted to testify to declarations made by James S. Boddie, in his life, tending to show his election to retain the advancements made him and renounce all claim to further distribution. As we have already declared, these declarations, if properly proved, would not amount to an election precluding his personal representative from claiming distribution, it would seem unnecessary to pass on this objection. But as it may arise, in the further progress of the cause, in various forms, we deem it proper to say, that § 2704 of the Code applies fully to proceedings in chancery, whether on a hearing before the chancellor or on a reference to the register. *Kirksey v. Kirksey*, 41 Ala. 626. When the purpose of evidence is to diminish the rights of a decedent, or of those claiming in succession to him, by declarations or admissions made by him, or transactions had with him, in his life, no party in interest is a competent witness to prove such admissions, declarations, or transactions.

It appears that at the death of intestate one Oates was indebted to him by open account. Of the amount of this indebtedness the administrator had no evidence, and was desirous of procuring some admission and recognition of it from Oates. With this view, the appellant Nathan V., who was then co-administrator with James S. Boddie, visited Oates, having been instructed by James S. not to receive from him Confederate treasury notes. Oates representing his inability to pay otherwise, prevailed on Nathan to accept twelve hundred dollars in Confederate treasury notes. James S. refused to recognize this payment, unless Nathan would accept it as a payment on his distributive share. Nathan consenting, he received from him the whole amount of the twelve hundred dollars. Subsequently Nathan received from him two hundred dollars of the sum, and used it in the purchase of a horse. What became of the remainder does not appear. It may have been used by James S., or mingled with his own moneys, so that its identity as assets was wholly lost. After the close of the war, James S. prevailed on Nathan to give him a receipt for the twelve hundred dollars, on the representation that he would otherwise be chargeable with and lose it. Oates at the close of the war was bankrupt. With this twelve hundred dollars Nathan was charged as a payment on account of his distributive share, to which he excepted, and the chancellor overruled the exception.

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No fact or circumstance appears from which any want of the diligence or good faith an administrator should observe in the collection of the debts due his intestate can be imputed to the administrator in the reception of this sum of Confederate treasury notes. It does not appear to what extent they were then depreciated, nor that they were not then generally received in satisfaction of debts. The administrator declared he could not use them in paying debts; but the estate was solvent, and it does not appear that the distributees would not have received them, and could not have used them. On the contrary, it appears that one of them did subsequently receive and use in the purchase of a horse two hundred dollars of the identical notes. If the administrator had, under the facts stated in the record, received these notes, and had not or could not have used them, but retained and returned them on his final settlement, he should have been allowed a credit therefor. It is only when an administrator is guilty of negligence or want of good faith that he should be charged with a failure to collect debts, or with the depreciation of a currency in which he makes collections.

We can perceive no substantial reason for charging Nathan V. with the full amount of these notes. His receipt is not conclusive, but is open to inquiry and explanation. The fact appears to be, that he never applied but two hundred dollars of them to his own benefit. The remainder was in the possession of the administrator James S., and for aught that is shown, may have been used by him or applied to his own purposes. The chancellor therefore erred in overruling this exception. Nathan V., should be charged with only two hundred dollars, the sum he received from the administrator. The administrator James S. should be charged with the remaining one thousand dollars, unless it is shown he did not use them, or commingle them with his own funds, and is not guilty of any want of diligence in failing to apply them either in the payment of debts, or to the benefit of the distributees.

Originally, James S. and Nathan V. were appointed joint administrators, on the 19th December, 1861. On the 27th February, 1862, Nathan resigned. He claimed to share equally in the compensation for services rendered prior to his resignation. Whether he is so entitled, the facts in the record do not enable us to declare. To joint administrators who are equally active in the performance of their duties, the compensation should be joint. How far Nathan participated in the administration, what services, if any, he rendered, whether his administration was not rather formal and nominal, the active duties devolving on his co-administrator, cannot be ascertained from this record. These are material inquiries in deter-

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mining what, if any, compensation should be allowed him. In apportioning compensation between joint administrators, the services actually rendered by each must be considered.

We have passed on all the assignments of error, and the result is the decree must be reversed and the cause remanded for further proceedings, not inconsistent with this opinion.

Holland v. Kimbrough *et al.*

Trover for Conversion of Mortgaged Property.

Varying written contract by parol; what evidence without the rule against. — In trover for conversion of mortgaged property, the defendant may show by parol that prior to the execution of plaintiff's mortgage, the mortgagor, for valuable consideration, had given defendant a right to receive and sell the property, satisfy certain debts, and return the surplus, and that this was made known to plaintiffs by the mortgagor, who refused to execute the mortgage without the defendant's consent, which was given upon mortgagees' consenting to the arrangement.

APPEAL from Circuit Court of Henry.

Tried before Hon. J. MCCAULEY WILEY.

The opinion states the case.

F. M. WOOD, for appellant. — The evidence did not contradict or vary the terms of the mortgage. Its effect was substantially to show notice of a prior lien, and also an estoppel on the part of the plaintiffs.

W. C. OATES, *contra*. — The effect of the evidence was to incorporate into the mortgage a new stipulation, appellant, although not a party, being privy to it. 22 Ala. 233; 21 Ala. 797; 40 Ala. 599.

JUDGE, J. — This was an action of trover by the appellees against appellant, to recover damages for the conversion of two bales of cotton. The foundation of the plaintiffs' title was a mortgage executed to them by one Harvey Owens on his crop of cotton to be made in the year 1870. The cotton covered by the mortgage was delivered at the defendant's gin; the defendant retained the possession of and sold the same, and appropriated the proceeds of the sale to the payment of an alleged balance of account due him by the mortgagor on transactions had between them the year previous. After the plaintiff had closed his evidence, the defendant was introduced as a witness for himself, and testified that an agreement had been entered into between himself and said Owens, the mortgagor, before the execution of the mortgage to the plaintiffs, to the effect that the defendant was to take the possession of and sell the

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crop that might be made by said Owens, in the year 1870, and out of the proceeds of the sale pay himself the balance due him on the account against said Owens, contracted the year before; and that plaintiffs had been informed of this agreement, before the execution of Owens' mortgage to them, which Owens refused to execute without defendant's consent.

Defendant's counsel then proposed to prove by the defendant that at the time the mortgage to plaintiffs was executed, and before defendant would consent to its execution, a similar agreement was entered into between the defendant and the plaintiffs, viz.: That defendant "was to take charge of, control, sell, and apply the proceeds of said Owens' crop for the year 1870, first to the payment of said balance due defendant by said Owens, and the rent due defendant, and pay the surplus to the plaintiffs." The court refused to allow this proof to be made, on the ground that it would be introducing parol evidence to vary the legal effect of the mortgage. In thus ruling the court erred.

The well known rule which prohibits the admission of parol or verbal evidence to contradict or vary the terms of that which is written, has no application to the question here presented. That rule, as Mr. Greenleaf in his work on Evidence says, "is directed only against the admission of any other evidence of the *language* employed by the parties in making the contract, than that which is furnished by the writing itself. The writing it is true may be read in the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties; but as they have constituted the writing to be the only outward and visible expression of their meaning, *no other words* are to be added to it, nor substituted in its stead." 1 Gr. Ev. § 277. It may be observed further, that the rule we are considering is applied only in suits *between the parties to the instrument*, and such is not the character of this suit. 1 Gr. Ev. § 279; *Venable v. Thompson*, 11 Ala. 147.

The evidence offered by the defendant was not an attempt to vary, by parol evidence, the terms of the mortgage. Before the mortgage was executed, Owens had made an agreement with the defendant, the legal effect of which was to create a lien in defendant's favor on the same crop afterwards mortgaged to the plaintiffs. The defendant's proposition was to prove that the plaintiffs had procured their mortgage with full knowledge of defendant's prior lien, and with a recognition of its prior right to satisfaction.

The agreement between the defendant and Owens amounted to a verbal or equitable mortgage from the latter to the former; and it is well settled in this State that a mortgage of personal property may be created by a parol agreement. *Morris v.*

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Turney's Adm'r, 35 Ala. 131; *Donald & Co. v. Hewitt*, 33 Ala. 534.

We deem it unnecessary to notice the questions presented by the refusal of the court to give the charges requested by the defendant, as they may not be again presented in the same form. Let the judgment be reversed and the cause remanded.

Kidd *et al.* v. Turner.

Motion to dismiss Appeals.

Appeals; practice as to amendment of. — Our law and practice do not favor the dismissal of causes from the appellate court for defective appeals which may be amended. In the present cause two appeals were taken to the same term from the same final decree; one merely giving bond for costs, the other superseding the same final decree and an order confirming a sale under it. Both appeals were defective for want of proper parties. On motion to dismiss, and counter motion for leave to amend, the court dismissed the first appeal, but retained the cause under the last, with leave to appellants to perfect the appeal on application during the term.

TAUL BRADFORD, for motion.

LEWIS E. PARSONS, *contra*.

MANNING, J. — There are two appeals, one of January 5, 1874, and the other of March 6, 1874, in this cause. Both are taken to the same term of this court, June term, 1874. And both are defective in not being taken in the names of all the parties who should be joined as appellants. The appeal bond given on the first appeal was for the costs only, and did not suspend the execution of the decree below. The appeal bond given on the 6th of March, 1874, was for a larger sum, and suspends the execution of the decree below, and shows that it is an appeal from the same decree (of 1873) that the former appeal was taken from, and also from a decretal order confirming a sale that was made under that decree after the former appeal was taken.

Appellees move to dismiss both of the appeals because there are two, and for want of proper parties appellant, — and each severally, for the latter reason. And the appellants move to perfect the appeal, by striking out of the record the appeal of January, 1874, in order that they may proceed upon that of March, 1874.

Our laws and practice do not favor the dismissal of a cause from the appellate court, for defective appeals that may be amended, but rather the amendment of them, when leave to amend is duly applied for. One appeal, though from the final

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decree in a cause, is sufficient to bring up the cause for examination into any error that may be assigned, in this court; and only one appeal ought to have been taken.

We dismiss the appeal of January 5, 1874, but retain the cause under the appeal of March 6, 1874; which appeal the appellants have leave to perfect, as they may be advised, by amendment to be allowed upon application to the court, during this term of the court.

The appellants will be charged with the costs accruing upon all of these motions.

Boit & McKenzie v. Maybin.

Action to recover Damages for Breach of Agreement to deliver Cotton in lieu of a Moneyed Debt.

1. *Contract; when becomes complete.* — Where an order or proposal for the purchase of guano is sent by letter to dealers in Georgia, who, in compliance therewith, ship the guano on board the cars in that State consigned, as directed, to the purchaser here, the contract of sale is complete in the State of Georgia.

2. *Same; validity of in Alabama.* — If valid by the laws of Georgia, such contract will be enforced here; the buyer cannot avoid it because the guano was not branded and inspected before sale under the inspection laws of Alabama.

3. *Charge as to ownership of cause of action; when erroneous.* — Until there is a sworn plea putting in issue the plaintiff's ownership of a cause of action, founded on a contract for payment of money, no issue can arise as to it, and a charge authorizing a verdict against plaintiff if he is not the owner is erroneous.

4. *Price of thing sold, when worthlessness of not defence to action for.* — In the absence of any warranty, fraudulent representation, or concealment, the worthlessness of the thing sold, or that it was of "no benefit" for the purpose for which it was bought, is no defence to an action against the buyer for the price.

APPEAL from Circuit Court of Henry.

Tried before Hon. J. McCaleb Wiley.

The opinion states the case.

J. A. CLENDENNIN, for appellant. — The contract was complete in Georgia, and the Alabama inspection laws have nothing to do with the case. 1 Parsons on Contracts, 524; *McIntyre v. Parker*, 3 Met. 207. Independent of this, a fair construction of the inspection law of this State would prevent its operation on this contract. There was no warranty, and the failure of the guano to produce beneficial results was therefore entirely irrelevant. 2 Ala. 181; *Ricks v. Dillahunt*, 8 Port. 134.

W. C. OATES, *contra*. — The facts take this case out of the influence of the case cited in 3 Metcalf. *Litchfield v. Falconer*, 2 Ala. 282; 19 Ala. 353. Our own Constitution and statutes alone determine the public policy of this State. *Atwood's Heirs*

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v. *Beck*, 21 Ala. 615. No effort was made to comply with the Alabama inspection law. The act makes it highly penal to sell guano, no matter what device is set up to escape the law, until proper inspection. If it can be avoided by the transaction here set up, all the evils it was intended to remedy remain unchecked. As the sale violated the provisions of that act, the contract sued on is void. 1 Parsons, pp. 380-2; 13 Ala. 21; 14 Ala. 23; 3 McLean, 214.

JUDGE, J. — The plaintiffs in the court below were dealers in the article of "sea-fowl guano," and their place of business was in the city of Savannah, in the State of Georgia. The defendant proposed to their agent in Alabama to purchase two tons of the guano, and by the verbal request of the defendant the agent transmitted to the plaintiffs an order for the same, with instructions to ship it to the defendant at Eufaula, Alabama, by railroad. The guano was shipped, pursuant to the order, and in due time was received by the defendant, who used it as a fertilizer. Subsequently, the agent of the plaintiffs took the obligation in writing of defendant to the plaintiffs, for the payment to them of the purchase-money, which obligation was executed in Alabama, and is the foundation of the present suit.

One defence to the action interposed by the defendant in the court below was, that the guano had not been inspected and branded before it was sold, by an inspector of fertilizers in the State of Alabama, pursuant to the provisions of the act of the legislature, approved March 1, 1871; and that therefore the sale was void, and that no action could be maintained for the recovery of the purchase-money, inasmuch as the act made it a penal offence, punishable by indictment, to sell any fertilizer within this State, which had not been inspected and stamped as required by the acts.

This act of the legislature, under the facts in evidence, had no application to this case; for, in legal contemplation, the contract was made in the State of Georgia. When a proposal to purchase goods is made by letter sent to another State, and is there assented to, the contract of sale is made in that State. *McIntyre v. Parks*, 3 Met. (Mass.) 207; 1 Par. on Con. 525.

The delivery of the guano on board of the cars at Savannah for shipment to the defendant, pursuant to his order, was a consummation of the contract of sale, and vested the title, on such delivery, in the purchaser, subject to the vendor's right, in a proper case, of *stoppage in transitu*.

The court erred therefore in refusing the charged asked, which asserted this proposition.

The court, at the request of the defendant, charged the jury

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in effect, that the plaintiffs could not recover, if the jury should believe from the evidence that the note or contract sued upon was not the property of the plaintiffs. This charge was erroneous because the interest of the plaintiffs in the cause of action was not put in issue by a plea verified by affidavit. Rules of Practice in Circuit Court, Rev. Code, p. 823; *Broadhead v. Jones*, 39 Ala. 96.

On the trial the defendant was introduced as a witness for himself, and was asked by his counsel if he had "received any benefit from the application of the guano." The witness answered that it had been of no benefit to him, but he "thought it was an injury,—as he did not get as good a stand as when he had used none." The question and answer were objected to by the plaintiffs, separately, and the court overruled each objection and the plaintiffs excepted. In thus ruling the circuit court erred. *Barnett v. Stanton & Pollard*, 2 Ala. 181; *Ricks v. Dillahunt*, 8 Porter, 134. No proof of warranty, fraudulent representation, or concealment was introduced or relied on.

For the errors we have pointed out, the judgment must be reversed and the cause remanded.

Tucker et al. v. Adams.

Action on Attachment Bonds.

1. "*Cause of attachment*;" what not issuable in attachment suit. — The cause for which an attachment issues, which cannot be made an issuable fact in the attachment suit, is not the relation existing between the plaintiff and defendant, whether it be that of landlord and tenant, or that of debtor and creditor — nor is it the existence of the debt averred.

2. *Same*. — The cause of attachment is the state of facts averred as entitling the party to the remedy. In the case at bar, the cause of attachment was the removal from the rented premises of a portion of the crop without payment of rent, &c. That the crop had not been removed, could not be made an issue in the attachment suit.

3. *Attachment bond; what breach of*. — The non-existence of the debt for which the attachment issues is a breach of the attachment bond, entitling the defendant to recover in a suit thereon the damages sustained.

4. *Landlord and tenant; what does not create relation of*. — The relation of landlord and tenant does not exist between vendor and vendee, where the vendee enters into possession under an executory contract of purchase, and makes default in the payment of the purchase-money; nor does such default entitle the vendor to elect a rescission of the contract, and treat the vendee as a tenant liable for rent.

5. *Attachment for rent; what statute contemplates*. — The statute authorizing an attachment for rent contemplates a tenancy, from year to year, springing out of contract.

APPEAL from Circuit Court of Henry.

Tried before Hon. J. MCCAULEY WILEY.

Appellee Adams brought suit against appellants, as sureties,
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upon an attachment bond which they and their principal, James Olive, executed on the 13th day of October, 1869, assigning as breaches that the attachment was wrongfully sued out, and that they had failed well and truly to prosecute it.

The writ was issued on the ground that Adams was justly indebted to Olive in the sum of four hundred dollars for rent, for the year 1869, and that without paying rent he had removed a portion of crops grown thereon, without Olive's consent. Shortly after the levy, the attachment was quashed by the circuit court on the ground that "the attachment was not directed to be levied on the crops grown on the land rented, and because it does not show that the relation of landlord and tenant existed;" and the corn and cotton attached was then restored to Adams.

The proof shows that in the year 1865 Olive sold Adams a tract of land, took his promissory notes therefor, put him in possession, giving him a bond for titles on payment of the purchase-money. At and before the attachment issued, the last note, one half of the purchase-money, was past due, and Adams had never received any deed. He was in possession when the attachment was levied, and had before the attachment issued removed a portion of the crops grown on the land without Olive's consent and without paying rent.

This was substantially all the evidence. The court, on plaintiff's request, charged the jury, "if they believed from the evidence that the attachment was sued out on the ground that the relation of landlord and tenant existed between Adams and Olive, that then the attachment was wrongfully sued out. The defendants excepted to the giving of this charge, and requested five written charges, which were refused, and to which refusals exception was duly reserved. The first of these charges instructed the jury to find for the defendant, if the attachment was sued out on the ground that Adams had removed a portion of the crops grown on the land, without payment of rent, and without Olive's consent, if they found these facts to be true. The second and third charges asserted Olive's right to treat Adams as his tenant, upon the facts in evidence, and to attach for rent upon removal of crops grown on the lands without Olive's consent, before paying rent. The fourth charge instructed the jury that it was immaterial whether Adams was Olive's tenant; that even if he were not, this was no ground on which to base a verdict against defendants. The fifth charge instructed the jury, if they believed the evidence, to find for the defendants. The charge given, and the refusals to charge as requested, are now assigned as error.

W. C. OATES, for appellant. — Adams having long failed to

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perform his contract, his vendor had the election to treat him either as tenant, and recover for use and occupation, or as a trespasser, and eject him by suit. *Seabury v. Stuart*, 22 Ala. 207; *Gould v. Thompson*, 4 Met. 224; 6 N. H. 251; *Woodbury v. Woodbury*, 47 N. H. 19; 2 American Reports, 58. Rev. Code, § 2607. The right to recover for use and occupation is based on an implied agreement to pay a *quantum valebat*. 7 Ala. 817. The relation of landlord and tenant, within the meaning of rent attachment law, then arises. 6 Ala. 620; 21 Ala. 745; 17 Ala. 314. The first alleged breach constitutes no ground of recovery. 16 Ala. 765. Having the right to recover for use and occupation, Olive was a creditor of Adams, and the evidence shows he removed crops without paying rent, &c.; therefore Adams could recover. *Kirksey v. Jones*, 7 Ala. 622. Under the Code, the defendant cannot put in issue the "cause for which the attachment issues;" but any other matter which he can raise on the trial of the suit constitutes no breach of the bond. 38 Ala. 381. The relation of landlord and tenant is not one of the causes which authorize the attachment, although it must be shown to authorize an attachment for rent. 17 Ala. 314. The non-existence of this relation was a good defence in the attachment suit, and could have been set up there.

WOOD, PUGH, and BAKER, *contra*.

BRICKELL, C. J. — The rule of the common law is, that a mere wrongful resort to legal process affords no ground of action. To support an action for the misuse or abuse of process, malice, and a want of probable cause, must concur. *McKellar v. Couch*, 34 Ala. 336; *Benson v. McCoy*, 36 Ala. 710. This rule probably subserves the ends of justice as to common law remedies, or the ordinary remedies pursued in courts of justice. An attachment is an extraordinary remedy, prescribed by the statute for extreme cases, and harsh in its operation. Its levy deprives the party against whom it issues as completely of the possession of his property, as the levy of final process founded on a final judgment. The nature of the remedy required that the party against whom it issues should have a more ample remedy against its misuse or abuse, than that which the common law afforded. The injury resulting from such misuse or abuse is more direct, and greater in degree, than that which follows the misuse or abuse of common law process, or of ordinary remedies. These do not authorize the seizure of property, nor do they involve imputations affecting more or less reputation and credit. Hence, the statutes of this State have always required, as a condition precedent to the suing out of an attachment, bond with sufficient security, in a pen-

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alty of double the amount of the demand sued for, conditioned for the payment to the defendant of all such damages as he may sustain from the wrongful or vexatious suing out of the attachment. On this bond, the statute gives the defendant a right of action, at any time within three years of the suing out of the attachment, before or after the attachment suit is determined, for the recovery of actual damage, if the attachment is wrongfully sued out, and vindictive damages, if sued out maliciously, as well as wrongfully. R. C. §§ 2992, 2993.

The statute carefully defines specific causes, or particular grounds or facts, which will authorize this remedy. If no one of these exists, the attachment is wrongfully sued out, and the plaintiff is liable for the actual injury sustained, though he acted from the purest motives, and had probable cause for believing facts existed, which justified a resort to the remedy. 1 Brick. Dig. 168, § 208. The statutes thus protecting the defendant against the misuse or abuse of the process, to avoid the delays incident to the introduction of collateral issues, not involving the merits of the controversy, and to give the suit the form, character and operation of an ordinary suit, commenced by personal service of process, prohibit the denial, or putting in issue the cause for which the writ issued. R. C. § 2992. The action on the bond, for the recovery of damages, being a plenary remedy for all the injury which could result, if the cause did not exist.

This action is founded on an attachment bond, and the complaint avers only a wrongful, not a vexatious, suing out of the writ, and seeks a recovery of actual damages only. The writ issued on the ground that the defendant was the tenant of the plaintiff, and had removed from the rented premises a portion of the crop grown thereon, without paying the rent, and without the consent of the plaintiff. The statute gives the "landlord a lien on the crop grown on rented land for the rent for the current year," and authorizes an attachment as a remedy for the enforcement of the lien. R. C. §§ 2961-2963. An affidavit of the special facts, and a bond as in other cases, is required as a condition on which the attachment may issue.

It is insisted by appellants that, on the trial of the attachment suit, the defendant therein could have denied or put in issue, the existence of the relation of landlord and tenant, averred in the affidavit, and the fact that there was not rent due or accruing. As these facts could have been put in issue, in the attachment suit, their non-existence does not authorize a recovery in this action. The cause for which an attachment issues, that cannot be made an issuable fact in the attachment suit, is not the relation existing between the plaintiff and the defendant, whether that relation is of landlord

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and tenant, or of debtor and creditor — nor is it the existence of the debt averred. The relation and the debt may exist, without the existence of any cause for the attachment. The cause of attachment, is the state of facts which entitle a party having a debt to resort to this remedy. In this particular case, the cause of attachment, was the removal from the rented premises, of the crop, or a portion thereof, grown the current year, without the consent of the landlord, and without the payment of the rent. This cause could not be put in issue on the trial of the attachment suit. If it did not exist in fact, the plaintiff could still prosecute his suit to judgment, leaving the defendant to controvert by an action on the bond the truth of this cause, and if untrue, to recover such damages as he suffered from the resort to the attachment. On the trial of the attachment suit, it was matter pleadable in bar, that the relation of landlord and tenant did not exist, and of consequence there was no rent accruing or due to the plaintiff, which could be recovered in that suit, or in a suit commenced in the ordinary mode. If there is not a debt due or owing from the defendant to the plaintiff in the attachment, the attachment wrongfully issues, and the condition of the bond is broken, entitling the defendant to nominal, if there is no actual damage. *Lockhart v. Woods*, 38 Ala. 631, and cases there cited.

The charge given by the court, to which an exception was reserved, and the charges refused, involve the same question. The proposition affirmed by the appellants, is, that the relation of landlord and tenant, exists between the vendor and vendee of real estate, when the vendee enters into possession, under an executory contract of purchase, and fails to make payment of the purchase-money at the time specified, and is liable for rent thereafter. The statement of the proposition, is its refutation. The relation of landlord and tenant subsists by virtue of an agreement, express or implied. The relation of vendor and vendee, is wholly different in its incidents, and in the rights of liabilities of the parties. If the vendor has not parted with the legal title, and the vendee fails to pay the purchase-money, he has three remedies, all of which he may pursue at the same time, and cannot be compelled to elect between them. He may maintain ejectment on his legal title, — sue at law for the recovery of the purchase-money, — and proceed in equity for the enforcement of his lien for the purchase-money. *Haley v. Bennett*, 5 Port. 452; *Duval v. McLoskey*, 1 Ala. 708. If he has parted with the legal title, the vendee could not by possibility be treated as his tenant. If he has not parted with the legal title, treating the vendee as his tenant, liable for rent, would operate a destruction of the contract of purchase, and the substitution of a different contract the

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parties did not make. Nor can it be said, that the vendor, because of the vendee's default in payment of the purchase money, has an election to rescind the contract of purchase, and treat the vendee as a tenant. It requires the concurring minds of both parties, to rescind as well as to make a contract.

The statute authorizing an attachment for rent, is framed in almost the identical language, certainly in language of the same signification, as the statute, giving a landlord a lien for rent, in priority of an execution against a tenant, levied on goods and chattels, found on the rented premises in possession of the tenant. R. C. § 2878. Each statute contemplated a tenancy from year to year, springing out of contract. It would scarcely be contended a vendor because of the vendee's default in the payment of the purchase-money, could assert the statutory lien as against an execution creditor of the vendee.

The result is the judgment of the circuit court; must be affirmed.

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Motion to dismiss Appeal.

"Subjecting to sale separate estate of married woman;" what is not within meaning of act of March 9, 1871. — Neither the use of moneys of the wife's statutory separate estate in permanent improvements on the husband's lands, nor his executing a trust deed on them to secure a debt due her, constitute them her statutory separate estate. On bill filed by the wife to subject the lands to her demands, a decree ordering a sale to pay the trust deed, but subordinating the claim for money used in improving the land to a mortgage given by the husband to a third person, is in no proper sense a "subjecting to sale the separate estate of a married woman," entitling her to an appeal and supersedeas without security, under the act approved March 9, 1871.

This was a motion to dismiss an appeal, on grounds which are fully stated in the opinion.

W. H. NORTHINGTON, *pro* motion. — The wife waived her rights by bill, electing to proceed against the property as her husband's, even if on the facts she could possibly acquire an estate on the lands, which is denied.

RICE, JONES & WILEY, *contra*. — The appellant belongs to a class favored by courts of equity; in a certain sense, is a "ward of the court." The statute is remedial and beneficial in its purpose, and should be liberally construed. If Smith should dismiss his appeal and allow the order to be executed and out of the proceeds satisfies his mortgage, appellant's right to be repaid out of the land, the money used in improving it,

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may be entirely lost. The statute intended to guard against this.

MANNING, J. — The appeal in this cause, is taken by a married woman, claiming the right to do so without giving security for costs, under Statute No. 50 of the Acts of the session of 1870-72 (p. 45), approved March 9, 1871.

It provides "that when any judgment of the circuit court, or any decree of the court of chancery, has been, or may be rendered, subjecting to sale the separate estate of a married woman, or any part thereof, be the same her statutory separate estate, or a separate estate otherwise created, such married woman shall be entitled to an appeal to the supreme court to revise such decree, without giving security for the costs of such appeal," &c., "and such appeal when taken to the next term of the supreme court shall operate as a suspension and stay of all proceedings," &c. ; provided "no judgment or execution lien which may have attached, shall be lost," &c.

Appellee Smith, having a mortgage with power of sale, of the land and other property involved in this controversy, was proceeding to make sale of it. This mortgage was made in 1871, by the husband of appellant, Mrs. Coleman, and by herself. Previously to this, in 1868, Coleman had executed to one McQueen, as trustee, a mortgage or trust-deed of the same property to secure to Mrs. Coleman, about \$3,500, the amount, or value of moneys, or property, her statutory separate estate, received from estates of her kindred, and used by her husband.

Therefore, Mrs. Coleman and her trustee filed their bill in this cause, setting up this earlier mortgage, and alleging also that her husband had invested about \$1,200, of her money, in permanent improvements on the land mortgaged by both of the instruments mentioned, and they charged that the husband had received as much as about \$4,500, in sums mentioned from certain estates, as the statutory separate property of his wife, and used the same.

The bill prayed an injunction to prevent the sale of the property, by appellee, Smith, and that the court would cause to be ascertained what amount was due to Mrs. Coleman, under the trust-deed in her favor, and how much was due to her for moneys employed in improving the real estate, — and would cause the property to be sold to pay the sums so ascertained to be due to her.

An answer and cross-bill were filed by Smith, the appellee, in which he charged fraud against Coleman and wife, and claimed priority of payment for the debt due to him, under

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the mortgage, executed by them both, of the land in controversy, in his favor.

By the decree, the chancellor ordered the land and other property to be sold, and that the proceeds be applied first to the payment of the debt of \$3,500, secured by the trust-deed to Mrs. Coleman, — and secondly, to the payment of the mortgage debt to Smith, — postponing to this, the claim of Mrs. Coleman for money of hers alleged to have been used in permanent improvements upon the lands.

Smith appealed from this decree, and afterwards Mrs. Coleman also appealed. And it is the motion to dismiss the latter appeal that is now under consideration. The motion is predicated on the idea that the interest Mrs. Coleman would have in the property, by reason of the improvement of it, as alleged, with moneys belonging to her, would be her "separate estate" within the meaning of the statute above referred to.

But this is an erroneous idea. The property was her husband's. It did not become her separate estate because he used money of hers in improving it. She might thereby, perhaps, acquire a right to charge the property with a lien for the payment back of her money, which was one of the things that she endeavored by this suit to do. She sought to have it sold as her husband's property, to pay this debt, alleged to be due from her husband to her, as well as the debt for which he had executed the trust-deed as a security. And in accordance with the prayer of her bill, the chancellor ordered the property to be sold as her husband's property, to pay his debts, but decided that the proceeds must be applied first to payment of the debt to her for which the trust-deed was made, and that the debt to Smith was to be next paid.

In no proper legal sense can this be called a decree "subjecting to sale the separate estate" of Mrs. Coleman. It does not therefore come within the statute.

And we think this statute, which is to suspend and supersede, without an indemnifying security, the execution of judgments and decrees, by which the rights of parties had been determined after judicial investigation, ought not to be strained by construction so as to reach cases not within the plain meaning of its terms.

The motion to dismiss will be granted, unless on or before the 18th day of March instant, a stipulation with a sufficient surety, shall be entered into on behalf of Mrs. Coleman, for the costs of her appeal. This stipulation may be approved by the register of the chancery court of Autauga county, and be certified by him to this court.

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Action against Surety on Administration Bond to recover Amount of Decree against Administrator.

¶ 1. *Section 2704, R. C.; competency of witnesses under.* — In a suit on a deceased administrator's bond against his surety to recover the amount of a decree rendered against the deceased in his lifetime, the administrator of the deceased, having testified to conversations had with the plaintiff tending to show that deceased had settled the decree, the plaintiff is a competent witness to prove that the settlement, as to which he had such conversation, did not relate to the decree.

2. *Admissions.* — Where a witness testifies that the plaintiff in answer to a question made certain admissions in one conversation, and the plaintiff testifies that the question was asked in a different conversation, it is error to refuse to permit the plaintiff to testify what reply he made, on the assumption that the question relates to a different conversation from that about which the witness testified. It is a question for the jury to determine, under appropriate instructions from the court.

APPEAL from Circuit Court of Elmore.

Tried before Hon. JAMES Q. SMITH.

The appellant, B. Thomas Cousins, sued the defendant Jackson alone, on a bond as surety of one Morris Cousins, the administrator of appellant's father's estate, to recover the amount of a judgment rendered against the administrator in the probate court on the 9th day of November, 1860. The suit was commenced on the 25th of March, 1870, and a trial had at the spring term, 1878, which resulted in a verdict for the defendant. No pleas appear in the record.

On the trial, as appears from the bill of exceptions, it was proved that Morris Cousins, the principal obligor in the bond sued on, died in 1865, and in the same year one W. T. McCain was duly appointed and qualified as his administrator. Said McCain was introduced as a witness by defendant, and testified "that a short time after his appointment, he met plaintiff, who asked him to accept service of a notice of some proceedings relative, in some manner, to the decree sued for, and witness refused, stating that he must be regularly made a party. In the same conversation plaintiff was asked by witness why he (plaintiff) did not sign a receipt to Morris Cousins for said decree when they had a settlement of it, witness saying to plaintiff, at the same time, that he (plaintiff) knew that Morris Cousins did not owe anything on said decree, and the only reply plaintiff made was, that he did not sign the receipt because said Morris Cousins would not pay or settle an individual debt plaintiff held against him." This conversation, as the bill of exceptions recites, was offered as "evidence of a settlement between Morris Cousins and plaintiff, in which said decree was included, and that there was nothing due to the plaintiff on said decree." The plaintiff was introduced as a

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witness in his own behalf, and asked by his counsel to state "what settlement had ever taken place between him and Morris Cousins since the rendition of said decree, in which said decree was embraced, and he answered, none. He was then asked by his counsel if any settlement had been had between him and Morris Cousins since the rendition of said decree, embracing other matters than said decree." To this question defendant objected, and the court sustained the objection and would not permit the witness to answer, and plaintiff duly excepted.

"Plaintiff was then asked by his counsel about the conversation testified to by McCain, and testified that within sixty days after McCain was appointed administrator of Cousins, he met McCain and presented him a notice to show cause, before the probate court, why the decree should not be revived, against him as administrator of Cousins, and asked him to accept service, which he refused to do, saying that he must be made a party regularly; that this was all that occurred on that occasion; that a short time afterwards, he and McCain met, when McCain said to him what is contained in the above statement of McCain's testimony." The plaintiff was then asked by his counsel "what reply he made to these statements of McCain, for the purpose of contradicting McCain as to what he stated was plaintiff's reply; to these questions the defendant objected on the ground that the matters inquired of related to different conversations than the one testified to by McCain, and a conversation about which defendant had not inquired." The court sustained the objection and would not permit the question to be answered, and the plaintiff duly excepted.

These rulings are now assigned for error.

ELMORE & GUNTER, for appellant.

WATTS & TROY, *contra*.

BRICKELL, C. J. — The defence which was sought to be established by the evidence, introduced by the appellee, was a payment of the demand on which the suit is founded, made by the principal debtor in his life. The evidence of this payment consisted of an admission proved to have been made by the appellant to the administrator of the principal debtor. Verbal admissions not operating as an estoppel, are subject to explanation or contradiction. The party making them may, if he can, show that he was mistaken, or that they are not true in point of fact. 1 Brick. Dig. 834, § 421. If deliberately made, and precisely identified, an admission often affords evidence of

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the most satisfactory character. A mere verbal admission, however, unsupported by any other evidence, should always be cautiously weighed, because of its liability to be misunderstood, the facility of fabricating the evidence of it, and the difficulty of disproving it. 1 Green. Ev. § 200; 1 Brick. Dig. 833, § 420.

The admission having been proved by the administrator of the principal debtor, the appellant as a witness for himself, offered to testify that subsequent to the rendition of the decree of the court of probate, against the principal debtor, which is the foundation of the suit, there had been between him and the principal debtor a settlement embracing other matters than the decree. The court on the objection of the appellee excluded the evidence. The evidence was relevant. It had a tendency to explain the admission proved to have been made by the appellant—to show that it referred to settlements in which the decree was not included. Or, it may have tended to show that if the appellant made the admission, as understood and repeated by the witness, the admission itself was not deliberately made, and was unfounded in fact. It also tended to contradict the witness proving the admission, by showing that the admission was untrue in point of fact, and could not have been made by the appellant. This was the tendency of the evidence, and it was therefore relevant. Its weight and sufficiency is a question for the jury.

Nor do we think the evidence was offensive to the exception contained in § 2704 of the Revised Code. The exception is thus expressed: "that in suits by or against executors or administrators (as to which a different rule is not made by the laws of this State), neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator or intestate, unless called to testify thereto by the opposite party." The exception excludes only evidence of a particular character, admissions made by, or transactions with a testator, or intestate. The proposition in this case, is, to prove an admission of appellant, that the decree had been settled by the principal debtor in his life. The point of controversy is, was that admission made, or, if made was it founded in fact, or in mistake. The admission certainly refers to a transaction with a deceased person, but that transaction is material only, in determining whether the admission was made, or if made to enable the jury to give it proper application. The admission is here the main fact, proved, or to be disproved—the settlements with the deceased, are only collateral to it. The evidence of appellant was not intended to prove such settlements as independent facts, disconnected from the admission. The settlements were material only so far as they enabled the jury

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to determine whether the appellant had made the admission imputed to him — or if he made it, whether it was founded in fact, or in mistake — or to determine whether the admission he made did not refer to settlements in which the decree was not included. Such evidence is not within the mischief the exception was intended to guard against. It is only when admissions made by, or transactions with, the dead, are offered as independent, original evidence, to charge them, or those claiming in succession to them, that the exception of the statute applies.

The exception in the statute rendering parties competent as witnesses, is intended to place them on grounds of substantial equality. If the appellant is precluded from giving evidence qualifying, or explaining, or contradicting, the admission proved by the personal representative of the deceased principal debtor, because it may be necessary for him to state admissions made by, or transactions with the principal debtor in his life, this equality is not preserved. The appellee was as competent to prove the admission as was the administrator of the principal debtor. It may be difficult, if not impossible, to explain or contradict the admission, and the explanation or contradiction is the clear right of the appellant, without referring to such admissions or transactions, and they may be known to the appellant only, the sole surviving party to them. To receive the admission against him, when proved by his adversary, or any other witness incompetent but for the statute, and deny to him the opportunity of explanation or contradiction, would produce inequality in the operation of the statute. *Sanford v. Sanford*, 5 Lansing (N. Y.), 486.

Nor does the appellee stand in a position to invoke the exception of the statute. He is not the personal representative of the deceased, nor does he stand in any such relation of privity to him, as to come within the mischief against which the exception guards. The judgment rendered against him, if one should be obtained, would operate only as evidence against the representative of the principal debtor. If the judgment is obtained, and the appellee satisfies it, and seeks a recovery over against the representative of the principal debtor, the appellant would certainly be a competent witness for him to prove that the demand had not been paid by the principal debtor in his life, nor embraced in any settlement they had made. In such suit, the judgment would only be one of the facts on which a recovery depends. If it could be admitted that because the judgment rendered in this suit might become a material element in another suit, in which the personal representative of the principal debtor would be a defendant, the appellee is entitled to invoke the exception, then the exception instead of

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being confined to particular suits between particular parties, must be extended to every suit which may result in the institution of the particular suit. It would embrace every case in which there could be a recovery over against an executor or administrator. A guarantor, or an agent entitled to seek indemnity from a deceased principal, or one who has been indemnified by a person deceased, and who could if charged, recover over, would be entitled to invoke the exception. The exception instead of being simple, clear, and easy of application, would be embarrassed in its administration, and would operate to exclude evidence, which the statute designed to let in, leaving its credibility to be determined by the jury. The mischief against which the statute guards by the exception, is permitting a party to testify to admissions made by, or transactions had with his deceased adversary, whose lips death has sealed from contradicting or explaining. It was not intended to operate between the living, when they do not stand in a representative capacity, or claim, in succession to the deceased. The authorities to which the counsel of the appellee refers, have been considered, and seem to us in harmony with this view. The first of these is *Stuckey v. Bellah* (41 Ala. 700), in which an administrator was sued individually for the conversion of a watch. Under the facts of the case the suit could as well have been maintained against him in his representative capacity as the property of his intestate; he had taken possession of the watch, asserting no right or title in himself. It was properly held, the plaintiff could not evade the exception of the statute, by electing to sue him individually, instead of in his representative capacity. The judgment in the suit would have operated as effectually to defeat the claim of the intestate to the watch, as if the suit had been against the defendant in his representative capacity. The case of *Stevens v. Hartley* (13 Ohio, 525), was an action against a residuary legatee, to charge him with a debt of the testator. The legatee claiming in succession to the testator, was as we have said within the spirit of the exception and entitled to its protection. So, in the case of *Waldman v. Crommelin* (46 Ala. 580), the administrator *de bonis non*, was claiming and suing as successor to the deceased administrator in chief. We are of the opinion the circuit court erred in the rejection of the evidence.

McCain, the administrator of the deceased principal debtor, proved that soon after he became administrator, the appellant requested him to accept notice of some proceeding relating to the decree, intended to be had in the court of probate. That he declined to accept the notice, and in the course of the conversation, asked the appellant why he did not give a receipt for the decree, when he and the deceased had a settlement of

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it, saying at the same time to appellant that he knew the deceased did not owe him anything on the decree. The only reply appellant made was, that he did not give a receipt because the deceased would not settle or pay an individual debt he had against him. The appellant testified that the notice he requested McCain to accept, was of an application to the court of probate for a revivor of the decree, and that McCain refused, saying if he was made a party to any such proceeding, it must be by regular service of process, and that this was all the conversation then had by them. A short time afterwards he had a conversation with McCain, in which McCain made the statement to him he had repeated. The plaintiff then proposed to state his reply to this statement, for the purpose of contradicting McCain. To this the appellee objected because it referred to a different conversation than that to which McCain had testified, and the objection was sustained. It is certainly true, that an admission made at one time cannot be qualified or controlled by counter or opposing declarations or admissions made at another time. Here, however, the witnesses were in direct conflict as to the time when the conversation between them occurred, in which the admission was made, if made at all. This conflict of evidence was matter for the jury. The evidence offered should have gone to the jury, under proper instructions from the court.

The judgment is reversed and the cause remanded.

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Bill in Equity to charge Realty with Payment of Legacy.

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1. *Minor ; testamentary capacity of.* — A minor has not testamentary capacity to devise land, or to charge it with payment of legacies.

2. *Same.* — Under our statutes, a minor over eighteen years of age may make a valid bequest of personalty or subject it to the payment of legacies ; but on failure or insufficiency of personalty the legacy cannot become a charge on the realty which descends to the heir.

3. *Will ; decree probating ; what conclusive of.* — A decree of probate of a will which disposes of personalty only, although it incidentally alludes to testator's realty — *e. g.*, as that none of it be sold to pay legacies — is conclusive only of its *factum* and validity as a will of personalty.

4. *Practice.* — Practice suggested as to probate of a will of a minor disposing of personalty.

APPEAL from Lawrence Chancery Court.

Heard before Hon. R. L. WATKINS.

This was a bill in equity filed by the appellants, Sophia Gibson, and Robert W. Banks, and Alice C., his wife, against Walter S., and W. C. Sherrod, and E. P. Shackelford, the appellees, seeking to charge certain lands with the payment of

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pecuniary legacies given by the will of Henry C. Sherrod, who at the time of his death was seized in fee of an undivided half interest.

The material facts of the case may be thus stated. Henry C. Sherrod, by last will and testament, made in June, 1860, bequeathed to Alice Banks, in her maiden name of Alice C. Sherrod, ten thousand dollars, and by a codicil, on the 16th day of the same month, bequeathed five thousand dollars to Sophia Gibson. It is provided in the codicil that in event the crops shall not be sufficient to pay the legacies in three years, that "whatever the crop shall fall short in payment of the legacies shall bear interest and be payable out of the succeeding crops; that the crops shall be applied *pro rata* to the payment of each legacy, and that no part of the property real or personal shall be sold to pay said legacies, but they shall be paid from the crops." No disposition or mention of real estate is made by the will or codicil, except the requirement that it shall not be sold to pay legacies, and the provisions of it relate solely to the above bequests, and the nomination of an executor.

At the testator's death, his brother, the defendant Walter S., was his sole heir, and the testator and his brother jointly were seized in fee of the lands in question, and owned a large number of slaves, mules, farming implements, and other personal property, situate in Lawrence county, where the testator resided at his death. At the making of the will, as well as at the time of the testator's death on the 17th day of June, 1860, he was a minor over eighteen, and under twenty-one years of age.

On the 13th of August, 1860, on the application of Benjamin Sherrod, who was nominated executor, the will was duly established, probated and admitted to record by decree of the probate court. The decree, however, is entirely silent as to the age of the testator, and after reciting the day set for the hearing of the application, the appointment of a *guardian ad litem*, service of notice upon the persons named as legatees, due publication, &c., and the proof taken as to the execution of the will, and the soundness of testator's mind, concludes as follows: "It is thereupon considered, adjudged and decreed, that said instrument of writing is fully proven and established to be the last will and testament, and codicil to the same, of Henry C. Sherrod, deceased, and is ordered to be admitted to record, and filed as such," &c. The executor qualified, took possession of sufficient personalty with which he paid the debts, an ample residue of personalty being left to pay the legacies. He died shortly after this, and up to the filing of the bill no successor had been appointed. The slaves were emancipated, and all the other personalty taken off or destroyed during the late war. The bill alleges that Walter S. was in possession of the lands

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from 1861 to 1867, and received the crops grown thereon, until in that year he executed a deed of trust to Shackleford, to secure certain debts to W. C. Sherrod, &c., "both of whom well knew at the time that the same was subject to the payment of complainant's legacies." The receipt of these crops by Walter S. is denied by respondents, and he in his answer, by way of cross-bill, sought to reopen and assail in the chancery court the probate of the will, and have the same vacated and annulled, &c. The allegations of the cross-bill and the proof on these points are, however, not material in the view which the court took of the cause.

A demurrer was sustained to the cross-bill so far as it sought to assail and reopen the probate of the will, and overruled "so far as it seeks to preclude said Walter S. Sherrod's allegations to the effect that said Henry C., at the time of his death, and at the dates of the last will and testament, and codicil, was a minor under twenty-one years of age;" and the chancellor (Hon. R. S. WATKINS) holding that the proof established that the testator at the time of the making of the will as well as at the time of his death, was over eighteen, but under twenty-one years of age, held the will valid as to the personalty, but void and inoperative as a disposition of the lands, incapable of devising them, or creating a charge upon them, or any interest descendible to the heir, and accordingly dismissed the bill.

The chief errors assigned are that the court dismissed the bill, and entered into an inquiry as to the age of the testator notwithstanding the decree of probate of the will.

E. H. FOSTER AND H. C. SPEAKE, for appellants, filed an elaborate brief in support of all the propositions of law essential to the relief sought by the bill. As the cause was decided upon a single point, the argument on that alone is given. As to the conclusiveness of the decree probating the will they argued as follows: In matters of this sort the jurisdiction of the probate court is original, plenary and unlimited. 10 Ala. 977; 36 Ala. 599; *Hall's Heirs v. Hall*, 43 Ala. 290. The age of a testator as well as his mental capacity is a *jurisdictional* fact. The above cases fully show that the probate court in the exercise of this jurisdiction is a court of general and superior jurisdiction, and when it has passed judgment, and the *jurisdiction* appears of record, the judgment is *conclusive*, as to all other courts, until set aside or reversed, and cannot be impeached for any irregularities which may have intervened after the jurisdiction attached. This is a well established principle in this State, never deviated from since *Wyman v. Campbell*, 6 Porter, 219. A superior court acts by right and not by wrong, and in regard to such court, every presumption is made in favor, not only of

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its proceedings, but of its jurisdiction. See *Grignon v. Astor*, 2 How (U. S.) p. 341. *Morgan v. Burnett*, 18 Ohio, 535; *Wright v. Watson*, 11 Humph. 529; *Woods v. Crawford*, 18 Geo. 526; *Sherman v. Stillman*, 4 Cowen, 294. As all things must be presumed to have been correctly done by the probate court in probating the will of H. C. Sherrod, it must be presumed that proof was made of his full age and general testamentary capacity — nor is it necessary that it shall appear in the record that such proof was made. This certainly is not a jurisdictional fact. 1 Brickell's Dig. p. 439, § 169. In *McGrew v. McGrew* (*supra*), the following language is used by the court: "We must presume that a court of competent jurisdiction acted correctly, unless the contrary appears; *that it had sufficient evidence to authorize an allowance of the will.*" For this general principle, see also 1st Jarman on Wills, 212; 1 Williams on Ex'ors, 368. And where we find in other States, courts of probate with jurisdiction and power similar to our own, the same principles are recognized, and the judgments of such courts in the probate of wills, is conclusive of the questions of the power and capacity of devising; the sanity of the testator, the due attestation and all questions relating to the validity of the will.

WILLIAM COOPER and W. P. CHITWOOD, *contra*.

BRICKELL, C. J. — By the common law infants were incapable of devising real estate. Females of the age of twelve years, and males of fourteen, could make a valid disposition of personal estate by will. 1 Jarman on Wills, 29. Testamentary capacity is fully defined by the statutes of this State. "Every person of the age of twenty-one years, of sound mind, may devise by his last will his lands, tenements, or hereditaments, or any interest therein, descendible to his heirs." R. C. § 1910. "All persons over the age of eighteen years, of sound mind, and no others, may also by their last will, dispose of all their personal property." R. C. § 1916. The statutes observe the distinction between a devise of real estate and a bequest of personalty, recognized at common law, effecting a change only as to the age at which capacity to make a disposition of personalty is imputed.

The law, and courts of justice, pursuing its spirit and maxims, have always favored heirs. They are appointed by the law to succeed to the estate of which a valid disposition is not made by will. "Plain words are required to disinherit them." Though it may appear the testator did not intend that his heir or next of kin should take his estate, real or personal, and intended to exclude them from succession to it, yet, if he fails

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to make a valid devise or gift to another, they will take under the statute of descents and distributions. *Denson & Wife v. Autrey*, 21 Ala. 205. Nor is it every testator who can disappoint his heir or next of kin. If the subject of the devise is real estate, he has not power to deprive the heir of the inheritance the law confers, unless he is of the age of twenty-one years and of sound mind. If the subject of the gift is personal property, the testator must be over the age of eighteen years and of sound mind, or the appointee of the law will take under the statute of distributions.

The object of the bill is to charge the lands of the testator with the payment of pecuniary legacies given by his will. At the making of the will, and at the time of his death, the testator, though above the age of eighteen years, was under the age of twenty-one years. The capacity to devise lands, conferred by our statute, includes the creation of all charges on real estate by last will. The statute not only limits the power to devise real estate, to persons who are of sound mind and of full age, but goes further, and expressly declares that which would have been matter of necessary intendment, that "all property not disposed of by will must be administered and distributed, as in case of intestacy, by the executor or administrator with the will annexed." R. C. § 1917. A charge of legacies on lands must be a devise, a disposition of the lands, or the statute intervenes, and declares they must pass as in case of intestacy.

If such is not the effect of the statutes, it is vain to fix the age of twenty-one years as an element of the capacity to devise lands. A testator having capacity to dispose of personalty only, could, by pecuniary legacies chargeable on his lands, as certainly and effectually disappoint and disinherit his heir as by an express devise to another. Thus indirection would evade and defeat the statute and its policy. The testamentary power of one who has not attained full age is confined to his personal property; when that fails, or is exhausted, his power is exhausted. If that is insufficient to meet the bequests and legacies he may make by will, they fail. The lands of the testator he had no power to touch. The law reserves to itself the manner of their disposition. No legacy or charge he may create by will can be visited on them.

It is said that the decree of probate is conclusive of the testamentary capacity of the testator, and therefore conclusive of his power to charge his real estate with the payment of pecuniary legacies. To this proposition we cannot assent. The will nominates an executor, and disposes of personal property only. It does not devise, or purport to devise, real estate, or any interest therein. As a will of personalty, the probate is

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conclusive of its *factum* and validity. Its validity as a will of personal property is the only inquiry on which the court of probate could have entered or passed in decreeing probate. The legal operation and effect of the will on real estate was not a question before the court of probate, or on which it had jurisdiction to pass. The decree of probate cannot of consequence be regarded as an adjudication of the question now presented. The will disposing of personal property only, its probate was unavoidable, the testator being of the age of eighteen years. It would probably have been better if the decree of probate had been qualified and limited by an express statement of the age of the testator, and that probate was granted of it as a will of personal property only. Whatever may be the form of the probate, it settles no question as to the power of the testator over his real estate. That question arises only when the operation of the will as affecting real estate is involved. *Baker v. Chastang*, 18 Ala. 417; *Osgood v. Breed*, 12 Mass. 525.

The testator not having capacity by reason of his infancy to charge real estate with the payment of legacies, we have not considered whether in any event lands descended could be charged with the payment of the legacies to appellants.

The decree of the chancellor is affirmed.

Rhodes v. King.

Trespass for Maliciously and without Probable Cause procuring Arrest, &c.

1. *Trespass for false imprisonment; what sufficient answer to.* — It is a sufficient answer to an action of trespass for maliciously and without probable cause procuring the arrest and imprisonment of plaintiff, that the arrest and imprisonment were made in due course of legal proceeding, by a proper officer, upon affidavit charging the commission of a criminal offence, and that no more force was used than is necessary," &c.

2. *Preliminary proceedings before justice; what not essential on.* — Technical accuracy is not to be exacted on preliminary proceedings before justices of the peace for violations of the criminal laws. If the language employed, according to its ordinary acceptation, will enable a court to gather from it that an offence against the criminal laws has been committed, the process cannot be held void.

3. *Same.* — Accordingly, a plea, in justification of an arrest averring that it was made by a proper officer on a warrant, duly issued by a magistrate, reciting that "the offence of obtaining goods and cotton under false pretences, to the amount of nineteen dollars and eighty cents, has been committed," &c., and based on affidavit charging that "John King [the party arrested and plaintiff in the suit] by false pretences obtained lint cotton of affiant to the amount of nineteen dollars and eighty cents, and that said John King is now in possession of said cotton," was held not subject to demurrer on the ground that no offence was charged, although an "intent to injure or defraud" is the gist of the crime charged.

4. *Plea, erroneous ruling sustaining demurrer to; presumption of injury therefrom.* —

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Where a demurrer is improperly sustained to a special plea, the presumption of injury arises compelling a reversal, unless it clearly appears that the party interposing the plea not only could have had, but did have, under some other plea the benefit of the defence set up by his special plea.

APPEAL from Circuit Court of Lauderdale.

Tried before Hon. JAMES S. CLARK.

The opinion states the case.

PATTERSON & JONES, for appellant.

O'NEAL & O'NEAL, and J. B. MOORE, *contra*. — The plea was bad, because the process, on the facts stated, was void. Mere "false pretence" in obtaining goods is no offence whatever; there must be an intent to injure or defraud. *O'Connor v. State*, 30 Ala. 13. See also *Duckworth v. Johnson*, 7 Ala. 580. If the demurrer was improperly sustained to the plea, defendant could have had benefit of his defence under other pleas, and there can be no reversal on that account. 38 Ala. 297; 24 Ala. 521; 36 Ala. 164.

MANNING, J. — The complaint in this cause is in trespass, for maliciously and without probable cause arresting and imprisoning plaintiff, and for maliciously and without probable cause causing plaintiff to be arrested and imprisoned for the space of three days, in December, 1869, on a charge of obtaining goods, or cotton, under false pretences.

To this, defendant pleaded the general issue, "not guilty," with leave to bring in any special matter. "He pleaded also a special plea, showing that he in December, 1869, by the name of Ham Rhodes, by an affidavit before a magistrate, charged that on or about the 12th day of December, 1869, John King, under false pretences, obtained lint cotton of him, to the amount of nineteen $\frac{1}{10}$ dollars, and that said John King is now in possession of said cotton:" Whereupon said magistrate issued his warrant setting forth that "the offence of obtaining goods and cotton under false pretences to the amount of nineteen $\frac{1}{10}$ dollars had been committed," and John King is accused of the offence, and therefore he orders said John King to be arrested and brought before him to answer to the charge, &c. The plea then goes on to aver that the warrant was delivered by the magistrate to a constable, who in pursuance thereof arrested plaintiff; that this arrest is the supposed trespass alleged to have been committed by defendant in the complaint, — and that no further force was employed than was necessary to arrest and bring plaintiff before said magistrate. This special plea was demurred to, and the cause of demurrer assigned is,

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that the affidavit and warrant copied into it did not charge any offence known to the law. The demurrer was sustained.

The complaint is in the form prescribed by the Revised Code, page 676. *And it is in trespass. Williams v. Ivey*, 37 Ala. 244; *Woodall v. McMillan*, 38 Ib. 622; *Holly v. Carson*, 39 Ib. 345.

If the arrest and imprisonment complained of, were made in a due and proper course of legal proceedings, upon process not void, charging plaintiff King with the commission of a criminal offence, in which the defendant Rhodes was the prosecutor, no action could be sustained against the latter for his participation therein until the prosecution was ended in favor of King. Then if it had been instituted without probable cause and with malice on the part of the prosecutor, King might sue him for malicious prosecution.

This would be an action, not of trespass, but trespass on the case; in which the record and evidence of the proceedings in the criminal case would be material to support the action. But these are not material — not even relevant or admissible in the action of trespass for false imprisonment. *Holly v. Carson*, 39 Ala. 345.

The plea seems, therefore, to have been designed — by averring that the arrest and imprisonment complained of were made in such a proper legal course of proceeding upon process against King for an alleged criminal offence — to defeat his action, by showing that he, Rhodes, was not guilty of what is technically a trespass by the part he took in that prosecution.

To make the plea available for this purpose, it must show that the prosecution was for what is legally a criminal offence upon valid process. If the offence charged was no offence in law, the affidavit and warrant, or other process which sets it forth, affords no excuse to any one for an arrest or imprisonment made in obedience to the precept, and any one concerned therein would be a *trespasser. Duckworth v. Johnson*, 7 Ala. 598.

Do, then, the warrant and affidavit sufficiently charge an indictable offence?

According to section 3714 of the Revised Code, "an intent to injure or defraud" is necessary to constitute the crime of obtaining goods by a "false pretence." And in an indictment this must be averred. *O'Connor v. The State*, 30 Ala. 9. But it is not alleged in the warrant or affidavit set forth in the plea. Is it necessary that it should be? The Revised Code, in section 3981, prescribes the form of the warrant and requires it to *designate or describe* the offence. The warrant set out in the plea does *designate* the offence just as it is desig-

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nated at the beginning of section 3714, and as it is generally designated in the law books. This is sufficient. It need not be set forth with the particularity required in an indictment on which the trial is to be had.

Under the provisions of the law in Clay's Dig. (p. 447), like those in section 3978 of the Revised Code, this court held, in *Crosby v. Hawthorne* (25 Ala. 223), that "in preliminary proceedings of this nature, which are usually had before justices of the peace, technical accuracy cannot be expected and is not required. It is sufficient, if giving to the language employed its ordinary signification, the court may gather from it, that an offence against the criminal law has been committed or attempted. . . . We must be content to gather the meaning of the party from the affidavit, and disregard the want of technical accuracy of description." The language of the affidavit in that case was less descriptive of an indictable offence than that in the affidavit in this cause. In *Field v. Ireland* (21 Ala. 240), an affidavit charged that goods had been feloniously stolen by some person or persons unknown to affiant; "and that from probable cause he *suspected* such goods were concealed in a trunk" belonging to persons named, "or in or about a boarding-house in Emanuel Street," &c. It was not alleged that the owners of the trunk knew that the goods were in it, or that they were stolen. But the court held that this authorized the magistrate to issue a warrant for receiving stolen goods, &c. See also *Ewing v. Sandford*, 19 Ala. 605. The ruling of the court sustaining the demurrer for the cause assigned was an error.

It is insisted that if this be error, it is error without injury; because under the general issue, with leave to bring in any special matter, the same defence could be made. Even if this were so, which is by no means conceded, the demurrer admitted the truth of the plea; and the court held that the facts alleged in it did not constitute a defence to the action. We must presume that it adhered to that opinion throughout the trial, unless the contrary be shown. And if so, it was not only not necessary for defendant to seek to make the same points over again on the trial, but it might have been thought not respectful to do so. The error is shown by the record, and it was not necessary that it should appear again by a bill of exceptions. *Eads v. Murphy*, in MS.

In regard to the charge of the court, as no evidence whatever relating to it is set out in the bill of exceptions, we will not undertake to pass upon its correctness.

For the error mentioned the judgment is reversed and the cause remanded.

[Beeson v. Lippman.]

Beeson v. Lippman & Brother.*Action on Bill of Exchange.*

1. *Bill of exchange, payee of; what does not show legal title out of.* — The mere indorsement of the payees' names in blank remaining on a bill of exchange, when introduced as evidence in a suit on the bill, does not show that the legal title was not in them.

2. *Same; action against acceptor; what not irrelevant evidence.* — In an action by the payees against the acceptor of a bill of exchange — no plea of *non est factum* being interposed — evidence that the acceptor acknowledged that he signed his name as acceptor, although unnecessary, is not irrelevant.

APPEAL from City Court of Eufaula.

Tried before Hon. E. M. KEILS.

Jacob Lippman & Bro. brought suit, on the 23d day of October, 1873, against Beeson to recover the amount of a bill of exchange drawn by them on him, and accepted by him on the 18th of April, 1873, payable to their order ninety days after date. On issue joined on plea of payment and the general issue there was a verdict for plaintiffs.

On the trial, plaintiffs offered to read the bill as evidence to the jury; but it appearing that it was indorsed in blank by having the name of plaintiffs written across the back, the defendant objected on the ground that the indorsement showed that plaintiffs did not have the legal title. This objection was overruled and an exception thereto duly taken. The bill of exceptions further recites that a witness, S. H. Dent, was permitted, against the objection and exception of defendant, to testify "that defendant acknowledged that he signed or wrote his name across said bill of exchange by way of acceptance."

The admission of the bill of exchange, and the admission of Dent's testimony, are now assigned for error.

A. H. MERRILL, for appellant.

S. H. DENT, *contra*.

MANNING, J. — The counsel for defendant below was mistaken in supposing that the mere indorsement by a payee of his name upon a bill of exchange, remaining in blank on it when introduced in evidence on an action upon the bill, proves, of itself, that the legal title was not in the payee.

This action was commenced after the passage of the act of April 18th, 1873, requiring suits on bills of exchange or promissory notes to be brought in the name of the persons having the legal title.

Even if the indorsement had been a full one to some third person, it would be presumed when the bill was found after-

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wards in the possession of the payee who had indorsed it, that it had been returned to him and become his property again. Much more will he be considered as having the legal title when the indorsement is made, as in this case, in blank. *Pitts v. Keyser*, 1 Stew. 154; 9 Porter, 366; *Evans v. Gordon*, 8 Porter, 142.

There is nothing in the exception to Dent's testimony; although unnecessary it was not irrelevant.

The judgment is affirmed.

Elmore County v. Long & Zeigler.

Action against County on Allowed Claim.

1. *County; on what claim suit against, cannot be maintained.*—Suit cannot be maintained against a county on a claim which has been audited and allowed without reduction.

2. *Same; remedy to compel payment.*—*Mandamus* will lie, if the commissioners' court refuses to act, to compel the collection of such tax as the law authorizes to pay such claims. After this, if the treasurer fails to pay them in their order, section 930 of the Revised Code furnishes an adequate remedy.

APPEAL from Circuit Court of Elmore.

Tried before Hon. J. Q. SMITH.

The opinion states the case.

WILLIAMS & GADDIS and THOS. H. WATTS, for appellant.

SUTTLE & KYLE, *contra*.

PER CURIAM.—It appears from the complaint that the claim against the county on which suit is founded had been audited and allowed by the court of county commissioners without reduction or abatement. Such claims are not the subject of suit against the county. *Marshall County v. Jackson County*, 36 Ala. 613; *Covington County v. Drunklin & Steiner*, in MS. If the court of county commissioners do not levy a tax, so far as they have the power, to pay such claim, they will be compelled to do so by *mandamus*. If they have exercised their power, and the county treasurer does not pay the claims in their proper order, the statute furnishes an adequate remedy against him and his sureties. Rev. Code, § 930.

The judgment is reversed and the cause remanded.

Mobile & Girard Railroad Co. v. D. & S. Williams.*Action against Carrier for Failure to deliver Goods.*

Invasion of province of jury; what charge is. — In an action against a carrier for failure to deliver goods intrusted to it for delivery at a particular place, the testimony being conflicting as to whether the goods had ever been so received, and whether freight had been paid on them, a charge *ex mero motu* that "if the jury believed, from the evidence, that the carrier received freight on the goods in question, that was sufficient evidence that the defendant had the goods in possession at that time," is an invasion of the province of the jury, and necessarily erroneous.

APPEAL from Circuit Court of Pike.

Tried before Hon. J. McCaleb Wiley.

The point on which the case turns is sufficiently stated in the opinion.

NORMAN & WILSON, for appellant. — The charge given *ex mero motu* invaded the province of the jury. 2 Ala. 310; 48 Ala. 420; 28 Ala. 510.

W. D. WOOD, *contra*. — Under the facts of the case, and the decision in *Garrett's Adm'r v. Garrett*, 27 Ala. 687, the charge excepted to cannot be held an invasion of the province of the jury. If it is objected to as misleading, the appellant should have asked an explanatory charge. 42 Ala. 51; 36 Ala. 684.

JUDGE, J. — This was an action by the plaintiffs below to recover of the Mobile & Girard Railroad Company damages for the failure to deliver certain goods alleged to have been received by the defendant to be delivered to the plaintiffs at Troy, Alabama.

There was a controversy between the parties based upon the evidence, as to whether the goods had ever been received by the defendant for delivery at the proper place of destination, and also as to whether the defendant had ever received pay for their transportation.

The court, of its own motion, gave to the jury the following charge: "If the jury believe, from the evidence, that the defendant received pay on the freight for the goods in question, that was sufficient evidence that the defendant had the goods at that time in possession." This was a charge upon the sufficiency of the evidence, and clearly invaded the province of the jury.

The judgment is reversed and the cause remanded.

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Martin & McTyer v. Hudson.

*Rehearing under Section 2814 of Rev. Code.*58 276
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1. *Motion to quash; when should be overruled.* — A petition for rehearing at law should not be dismissed and the *supersedeas* quashed, on a mere general motion not pointing out any specific defect. Such a motion is in effect a mere general demurrer.

2. *Rehearing at law; what necessary to authorize.* — To authorize a rehearing at law, under the statute, there must concur a valid defence, the failure to make it (without fault on the part of the petitioner) resulting from surprise, accident, or fraud, and the exercise of all reasonable diligence to interpose the defence before judgment.

3. *Same.* — Where the failure to make the defence was due to the accidental absence from sickness of the witness by whom the proof was to be made, it must be shown that he was the only witness by whom the defence could be established; a rehearing not being authorized on account of the failure to introduce mere cumulative or corroborative evidence.

APPEAL from Eufaula City Court.

Tried before Hon. E. M. KEILS.

The opinion states the case.

BUFORD & DENT, for appellant.

BENJAMIN GARDNER, *contra*.

BRICKELL, C. J. — Prior to the Code, the term of the court was the limit within which the power of granting new trials could be exercised. 2 Brick. Dig. 276, § 3. The Code enlarges the power of the court in this respect, and authorizes a grant of rehearings in particular cases, on application properly made, after the close of the term at which final judgment was rendered. R. C. §§ 2812–28; *Pratt & McKenzie v. Kiels & Sylvester*, 28 Ala. 390; *White v. Ryan & Martin*, 31 Ala. 400.

The section of the Code under which this application is made provides, that if a party is prevented from making his defence by surprise, accident, mistake, or fraud, without fault on his part, he shall be entitled to a rehearing, on application made within four months from the rendition of judgment. R. C. § 2814. It is observable, that the statute is framed in almost the identical language of the rule on which a court of equity proceeds in granting or refusing relief, against a judgment at law, because of defences available in a court of law. Hence, in construing the statute, and in determining the right to relief under it, the decisions of the court of chancery have been regarded as furnishing controlling analogies.

The application in this case was made within the prescribed time, after due notice to the appellee. It avers a full and complete defence to the suit in which the judgment was rendered,

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— the defence being payment of the demand. It also avers that this defence would have been established by the evidence of one of the petitioners who made the payment, and that by reason of very sudden and unexpected illness, he was prevented from being present on the trial. That on the evening before the trial, he saw his attorneys and notified them where to send for him, when the case should be called, but a short distance from the court-house. The case being called, each party announced readiness for trial, and he was sent for, but was found too ill for attendance, and was under the influence of morphine to such an extent that he was not conscious. On being informed of these facts, an application for a continuance was made by his attorneys, which was refused, as was an application that a verified statement of his evidence should be received instead of his oral examination. A *supersedeas* was granted on the filing of the petition. When the application came on to be heard in the city court, the appellee made a general motion, not assigning any specific cause, to quash the *supersedeas* and dismiss the petition, which was granted. Under our system of pleading and practice, we doubt if such a motion should ever be entertained. The statute of amendments, is very liberal, and extends to the curing of nearly every fault, defect, or mistake, which may be committed in pleading, or in the suing out of process. That such faults, defects, or mistakes may be clearly pointed out, and the party afforded the opportunity of correcting them by amendment, if he can consistently with the facts, no general demurrer is allowed, but each demurrer must be for matter of substance, distinctly stated. R. C. § 2656. A motion of this character, in a case of this kind, is in effect a general demurrer. It can reach no defect, of which at common law advantage could not be taken by a general demurrer. It involves every mischief which is sought to be avoided by abolishing general demurrers. The party against whom it is interposed has not his attention called to the particular defects in his pleading, at which the motion is aimed, so that by amendment he can cure them. On appeal to this court, the judgment might be affirmed or reversed because of objections not taken in the primary court, and which, if made there, the result reached here would be avoided. The motion should have been overruled, and we are bound to pronounce that the court erred in granting it.

The statute under which this application is made confers a right to a rehearing only on defendants who had a valid defence, which they were prevented from making, by surprise, accident, mistake, or fraud, without fault on their part. To authorize a rehearing, there must be a concurrence of a valid defence, — the failure to make it, must have resulted from sur-

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prise, or accident, or mistake, or fraud, and there must have been the exercise of reasonable diligence to interpose the defence before judgment. *White v. Ryan & Martin*, 31 Ala. 400; *Shields v. Burns*, Ib. 535; *Stewart v. Williams*, 33 Ala. 492.

The application in this case discloses a valid defence. It further discloses that the absence of the petitioner, on whose evidence it was expected to make the defence, was an accident. That this absence was communicated to the court and its cause, so soon as it was known, and made the ground of an application for a continuance. That it was not earlier known, cannot be attributed to any fault of the petitioners, or their counsel. The petition does not, however, disclose that the petitioner was the only witness by whom the defence could be proved. The want or discovery of merely cumulative evidence is not, as a general rule, ground for a new trial. Otherwise, it has been said, "not one verdict in ten would stand. Some corroborating evidence may always be found or made; and the trial by jury would become the most precarious of all trials." Hilliard on New Trials, 380, § 13. It is perhaps a stricter rule in equity, that it will not relieve against a judgment at law, because of mere cumulative evidence to establish a legal defence. Hilliard on Injunctions, 182, § 56. The rule should be strictly applied to applications for a rehearing at law. If the application is because of the absence of cumulative evidence — evidence corroboratory, or in support of evidence offered to establish an attempted defence — the application should not be granted. Jury trials, and judgments are now lamentably precarious, without permitting this statute (intended only for extreme cases, and to substitute for a remedy existing before only in equity, an easier and more expeditious remedy at law) to be perverted into a mere instrument for procuring new trials, protracting litigation, and a temptation to fraud and perjury in the fabrication of evidence, to meet the necessities of a defence, once condemned by verdict and judgment.

The petition should have averred that the petitioners had no other evidence of the payment than the testimony of the petitioner, prevented by sickness from attendance. If there was no written evidence of the payment, and he was the only person, other than the plaintiff, to whom the fact of payment was known, a clear case for relief under the statute exists.

It is insisted by the counsel for appellee, that entertaining the petition will in effect be a revision and reversal of the action of the city court on the application for a continuance, — a matter resting entirely within its discretion. The application for a continuance was properly made, to relieve the petitioners from the imputation of *laches*. If they had not made it, they

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could not have affirmed they were prevented without fault on their part from making their defence. They would have failed to take one of the measures provided them by law, to secure a hearing at law. The application is a fact only, touching the question of diligence. The correctness of the action of the court in refusing it does not come under review. *McBrown v. Somerville*, 2 Stew. 515; *Phair v. Reynolds*, 3 Ala. 521.

The judgment is reversed and the cause remanded.

Bailey v. Litten, Administrator.

Bill in Equity for Assignment of Dower.

1. *Contract, rescission of on ground of fraud; allegations as to.*—He who seeks the rescission of a contract on the ground of fraud or undue influence must show his right to relief by distinct and pointed allegations clearly proved.

2. *Dower; consideration for renunciation of.*—The wife, as the consideration on which she will renounce her right of dower, may require a consideration enuring solely to her; if she fail to exact this, her release will be good if supported by an adequate consideration moving to the husband alone.

3. *Same.*—A verbal promise to the husband by one who had purchased his lands at mortgage sale, that if the husband and wife would execute a quitclaim deed to these same lands, which were then about to be sold under executions the lien of which was superior to the mortgage, the promisor would purchase at that sale also and give the husband better and easier terms of redeeming than allowed by law, is a sufficient consideration moving to the husband to support the wife's release of dower. This consideration may be shown notwithstanding the deed express a nominal consideration in dollars.

4. *Fraud and undue influence; what does not constitute.*—Mere persuasion, unaccompanied by falsehood, undue concealment, or delusive promises, or by any violence, duress, or constraint, constitutes neither fraud nor undue influence.

APPEAL from Chancery Court of Lawrence.

Heard before Hon. R. L. WATKINS.

The opinion states the case.

R. O. PICKETT, for appellant.

WILLIAM COOPER, *contra*.

BRICKELL, J.—This is a bill in equity for an assignment of dower, and discloses that the complainant had in the life of her husband joined with him in a conveyance of the lands in which dower is claimed to Falk, the intestate of the appellee Litten. The legal sufficiency of this conveyance to bar the complainant of dower is not questioned. It is averred, however, that the complainant was induced into its execution by the fraud and undue influence of Falk, the grantee, and therefore the court is prayed to remove it as a bar to dower. We will pass over without consideration any

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insufficiency or defect in the bill, because of the generality and vagueness of the allegations of fraud and undue influence; as we believe, without resting the decision on mere rules of pleading, the merits of the case can be finally adjudged upon the evidence, without injury to any of the parties in interest.

The facts of the case as disclosed by the evidence lie within a very narrow compass. Bailey, the husband of the appellant, was during coverture seised in fee of the lands in which dower is claimed. He became indebted to Falk, and in consideration of an extension of the day of payment of his indebtedness, executed a mortgage or deed of trust on the lands for the security of the payment thereof. When this mortgage or deed of trust was executed there were subsisting decrees, on which writs of execution could issue against Bailey, in the court of probate of the county in which the lands were situate. These decrees were asserted as liens on the lands, superior to the title created by the mortgage or deed of trust. Under the mortgage or deed of trust, after the expiration of the law day, a sale of the lands was made and Falk became the purchaser. Executions founded on the decrees of the court of probate were issued and levied on the lands. After advising with counsel, Falk concluded to purchase the lands at the sale under the executions, and, to perfect his title, to obtain a quitclaim conveyance from Bailey and his wife, the appellant. The only inducement offered to the appellant and her husband to unite in the execution of such conveyance was that the husband should have the right or privilege of repurchasing or redeeming the lands on paying Falk the mortgage debt and the sum he should pay in the purchase at the execution sale. The husband having expressed the opinion that the appellant would join in the conveyance, it was prepared, sent to the residence of the husband, and there executed in the presence of two witnesses, who attested it. It was immediately placed on record, and the husband dying soon after, and Falk having purchased the lands, the appellant made a proposition, and concluded it, for the rent of the lands for the succeeding year. The quitclaim conveyance was not read to the complainant when she executed it, but we cannot resist the conviction, that she was informed of its character and legal operation. She had no other interest in the land than a contingent right of dower. On this interest only, so far as she was concerned, could the conveyance operate. She must have known the purpose of procuring her execution was to divest her of this interest. The expression she declares she used when she executed it, though it may indicate her reluctance to execute, also indicates her knowledge of the effect of her execution. "She was giving or handing a stick to break her own head," is the expres-

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sion, and it shows she knew she was parting with that she could retain. By her own act, she was enabling another to deprive her of a right she alone could transfer. Her reluctance to execute was not overcome by any misrepresentation, or by concealment, or by delusive promises, or by any violence, duress, or constraint. Persuasion may have been resorted to, but mere persuasion in which falsehood does not mingle is not undue influence or fraud. The expectation of benefits accruing to the husband, by his having a longer time, and easier terms for the redemption of the lands, than the law imposed, was doubtless the controlling motive with him and the complainant in the execution of the conveyance. We find nothing in the evidence warranting the imputation of bad faith to Falk in his promises as to the redemption of the lands. They would doubtless have been observed, if Bailey had lived, and been able to perform the part devolving on him.

Fraud and undue influence are not presumed. Whoever in a court of equity bases a right to the rescission or cancellation of a contract on allegations of either or both, must distinctly allege and clearly prove the fraud or undue influence. *Juzan v. Toulmin*, 9 Ala. 662. This rule is of very general application in a court of equity or of law. Whenever the facts are consistent with good faith and fair dealing, fraud cannot be imputed. *Smith v. Bank of Mobile*, 21 Ala. 125; *Henderson v. Mabry*, 13 Ala. 713. No fact in the cause is irreconcilable with the good faith and fair dealing of Falk, the grantee. He seems to have sought only the security of the debt due him. This was his legal right, and it was the moral duty of the husband to afford it, so far as he could, without prejudice to the rights of other creditors, if he had any. The lands had been purchased by him, under the mortgage; but the contingent right of dower of the complainant was an incumbrance on his title, as the decrees of the court of probate seem also to have been regarded. To remove these, he proposes to purchase under the executions issuing on the decree of the court of probate, and to obtain from the husband and wife a quitclaim conveyance which would operate a release of her contingent right of dower. While he thus perfected his title to the lands, he was willing still to hold them as a mere security for his debt, and the reimbursement of the moneys he should be compelled to expend in the purchase of the lands. It is not asserted that the debt secured by the mortgage, and the amount paid at the sheriff's sale, did not equal the full value of the lands freed from the right of dower. The indebtedness of the husband being extinguished to the full extent of the value of the lands, he may have felt that it was but just Falk should have a perfect title. Hence, when a conveyance which will operate as a bar to his

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wife's dower is suggested, he expresses the opinion that she will execute it. In his presence she does execute it. He was her legal protector and adviser, and there is no reason for supposing he would not have guarded her against fraud or imposition if any had been attempted. Indeed, to sustain the complainant's case would require us to indulge the supposition that he was the most active agent in perpetrating the fraud of which she complains.

The consideration expressed in the conveyance is merely nominal. It was not intended as the expression of the real consideration that grew out of the transactions between Falk, the grantee, and the husband, Bailey, to which we have adverted, and the promise of Falk to allow the repurchase or redemption of the lands. The consideration moving to the husband was not in any sense inadequate, and is sufficient to support the wife's release of dower. A wife may require a consideration enuring to her only, as a condition on which she will renounce her right to dower, or she may renounce without such consideration, on a consideration moving to her husband only. *Hoot v. Sorrell*, 11 Ala. 386. The complainant did not require, as a condition to the execution of the conveyance, any consideration moving to her separately. She was content with the consideration passing to her husband, and that being adequate, the conveyance must be sustained. There is no aspect of the case in which the complainant is entitled to relief, and the decree of the chancellor dismissing the bill is affirmed.

Wyatt v. Evins.

Action on Promissory Note.

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1. *Section 2759 R. C.; what not revisable under.* — On appeal under section 2759 R. C., the appellate court can revise such only of the adverse rulings compelling nonsuit, as are properly made matter of exception and reserved by bill of exceptions.

2. *Promissory note; what sufficient consideration for.* — A promissory note given in consideration of a loan of Confederate treasury notes, made between citizens of this State during the late war, is supported by a sufficient consideration.

3. *Same.* — A compromise of matters in dispute and litigation between the parties is of itself a sufficient consideration, in the absence of fraud, to support a promissory note given in pursuance of the settlement.

4. *Practice on reversal.* — The court declined on reversal to render judgment here, but remanded the cause, following and reaffirming the rule in *Edwards v. Edwards*, 1 Ala. 401.

APPEAL from Circuit Court of Perry.

Tried before Hon. M. J. SAFFOLD.

The opinion states the case.

LAWSON & BRAGG, for appellant.

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POWHATAN LOCKETT, *contra*.

JUDGE, J.—The act of 1846 authorized a plaintiff, when compelled to enter a nonsuit in consequence of the adverse ruling of the court, to revise the decision in this court, whether made upon the pleadings or the evidence; and if the record disclosed the point decided, a bill of exceptions was not necessary to present it. *Duncan v. Hargrove*, 22 Ala. 150; *Blackburn v. Minter*, Ib. 613.

But section 2759 of the Revised Code is materially different from the act of 1846, in one respect; as construed by this court, that section requires that the plaintiff, when compelled to suffer a nonsuit on account of an adverse ruling of the court on the trial, must reserve the point by bill of exceptions, if he wishes to revise the action of the court, even when the ruling is otherwise disclosed by the record. *Palmer v. Bice et al.* 28 Ala. 430; *Vincent v. Rogers*, 30 Ala. 471. And see the more recent cases of *Welch v. Mayor, &c.* 48 Ala. 291; *Paulling v. Marshall*, 47 Ala. 270; *Darden v. James*, 48 Ala. 33; *Hatchett v. Orne*, in MS.

Therefore, we cannot, in this case, revise the rulings of the court below upon the pleadings, but are restricted to the consideration of the charge of the court alone, to which the bill of exceptions shows an exception was taken, and which caused the plaintiff to suffer a nonsuit.

The charge was that if the jury believed the evidence they must find for the defendant. The evidence was without conflict, and showed that the plaintiff's intestate loaned to the defendant, in the month of April, 1863, \$5,400 in Confederate States treasury notes, and took the promissory note of the defendant, due twelve months after date, for the payment thereof; that the note was not paid at maturity, and plaintiff's intestate instituted suit upon it; that while the suit was pending it was compromised between the plaintiff and defendant therein, by the defendant agreeing to pay to the plaintiff the gold value of the Confederate currency, at the time it was loaned, which was estimated by the parties to be \$1,166.40; that \$600 in gold was paid by the defendant, pursuant to the terms of the compromise; that he gave his note for the balance of the \$1,166.40, which note is the foundation of the present suit, and that the original suit was dismissed. On this evidence the charge of the court was clearly erroneous.

It has been decided by this court, during the present term, that a promissory note given for a loan of Confederate States treasury notes made during the late war was supported by a valid consideration, and that the measure of damages in a recovery upon such a note was the value of the Confederate

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money at the time it was loaned. *Whitfield v. Riddle, Adm'r*, in MS. But wholly irrespective of this question, the charge of the court cannot be sustained. The compromise of the matter in dispute between the parties, and about which litigation was pending, is, of itself, in the absence of fraud, a sufficient consideration to uphold the contract of settlement, which, when made, was binding on both the parties. *Allen & Wife v. Prater*, 30 Ala. 458.

It is insisted by the appellant that if we should reverse the judgment of the circuit court, we should also render such judgment as the court below should have rendered. In cases like the present, we deem it the safer and better practice to remand on a reversal, in obedience to the rule established in *Edwards v. Edwards* (1 Ala. 401), which, ever since that decision was made, has been recognized and acted upon by this court. *Townsend v. Harwell*, 18 Ala. 301; *Rawles v. Kennedy*, 23 Ala. 240; *Tenn. & Coosa R. R. Co. v. Moore*, 36 Ala. 371.

For the error we have named, let the judgment be reversed and the cause remanded.

Taylor, Administrator, v. Pettus.

Petition by Widow to Probate Court to compel Administrator to pay Money into Court in Lieu of Exempt Property sold.

1. *Retroactive operation; what act has not.* — The act "to regulate property exempted from sale for payment of debts," approved April 23, 1873, is not retroactive in its operation.

2. *Exemption; what law governs.* — The laws in force at decedent's death govern as to the amount and kind of property exempt from administration for the benefit of the family.

APPEAL from Madison Probate Court.

On the 20th day of August, 1873, Mary Pettus, in behalf of herself and a minor child, filed her petition in the probate court praying that appellant Taylor, the administrator *de bonis non* of her deceased husband, be ordered to pay into court for the benefit of herself and minor child, out of moneys in his hands, derived from a sale of the real and personal property of intestate for the purpose of paying debts, the "average value in money of one hundred and sixty acres of land which he sold belonging to the estate," and also the further sum of \$1,000, "claimed as exempt, to any resident of the State, from payment of debts, who dies leaving a widow or minor child surviving."

Petitioner's husband, a resident citizen, died in Madison county on the 7th day of August, 1870, seised of about 800

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acres of land situated in the county, in 240 acres of which dower was allotted the widow, including the homestead of the decedent. The personal property exempt from administration under § 2061 R. C. was also set apart to the widow on the 6th of December, 1870. The estate was duly declared insolvent on the 12th of May, 1873, and before the 16th of January, 1873, all the lands of the decedent, subject to the widow's dower, had been sold under order of court for payment of debts, the sales confirmed, and conveyances executed, under the order of court, to the purchasers. The administrator in chief having died, his administrator settled his accounts on the 16th of October, 1872, on which settlement a decree was rendered against him for the sum of \$9,160.53. At the date of the filing of the petition the administrator *de bonis non* had not settled his accounts, and he claimed credit for various sums expended by him in and about the administration, as preferred claims against the estate. It is alleged in the petition, however, that the administrator *de bonis non* in the report of insolvency admits that he has on hand the sum of \$2,208 derived from a sale of the real estate, and the sum of \$1,389.98 derived from a sale of the personalty, and from this fund it is asked that the administrator make the payments prayed for in the petition. No person was made a party to the petition, but the administrator *de bonis non* filed an answer, in which was incorporated a demurrer, and the parties appeared and introduced evidence on the trial. The grounds of demurrer were in substance that no person was made defendant; that the minor child was not made a party; and that the decedent's husband died before the passage of the act under which the exemption was claimed. The answer of the administrator *de bonis non* alleged no facts other than those stated in the petition, except as to the unsettled state of his accounts and the settlement made by the administrator in chief, and the proof on the trial established these facts as well as those stated in the petition.

The court overruled the demurrer, and ordered the administrator *de bonis non* to pay into court the sum of \$769, as the value of the land allowed to the widow and minor child, and "the further sum of \$1,000, as the exemption of personal property, to be distributed according to law," &c.

Appellant excepted to the overruling of the demurrer and the decree rendered, and now assigns them for error.

DAVID D. SHELBY, for appellant.

WILLIAM RICHARDSON, *contra*. — The probate court had jurisdiction to make the order appealed from. 40 Ala. 530; 42 Ala. 315; 17 Ala. 482. The terms of the act of 1873

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show that it was intended to operate retrospectively, and to effectuate the constitutional exemption. The statute is not unconstitutional and does not impair the obligation of contracts. *Martin v. Hughes*, 67 N. C. 293. It should be liberally construed. *Brickell's Digest*, § 255, p. 908. The act of the administrator in selling exempt property cannot prejudice the widow and minor child. 46 Ala. 402. The fact that dower has been assigned the widow does not diminish her rights. 45 Ala. 274; 40 Ala. 530; 42 Ala. 315.

JUDGE, J. — The act of the 23d of April, 1873, on which the proceeding in this case seems to be based, was not intended to have, nor can it have, any retroactive operation. All the rights which the family of the deceased had in property of the estate, exempt from administration, accrued to and vested in them under and by virtue of the laws upon that subject which were of force at the time of the death of the husband. The probate court, in deciding otherwise, committed an error.

It is not necessary, in this case, that we should discuss or decide the question as to the jurisdiction of the probate court to render moneyed decrees in cases similar to the present.

For the error above named, the decree of the court below must be reversed and the petition here dismissed.

Darden v. Lovelace.

Action for Price of Stock of Corporation.

1. *Personalty, sale of; when property passes.* — If by the terms of an agreement for the sale of personalty, any material act connected with the subject-matter of the contract remains to be done before delivery, the property does not vest in the buyer until the performance of that act; and where the contract is not in writing, it is a question for the jury to determine on the evidence, under appropriate instructions from the court, whether a contract was made, and if so, whether it was executed or merely executory.

2. *Evidence; what irrelevant.* — In an action to recover the price of shares of stock sold and delivered to defendant — the issue being as to the sale and delivery and plaintiff's ability to sell and deliver — a certificate of shares of stock in favor of plaintiff's wife and minor children, which he had no authority to sell and transfer and had not transferred, is irrelevant and incompetent evidence on the part of the plaintiff.

APPEAL from Circuit Court of Chambers.

Tried before Hon. LITTLEBERRY STRANGE.

Appellant commenced this suit against appellee to recover the price of fifty-three shares of the capital stock of the "Rock Mills Manufacturing Company," which appellant alleged he had sold and delivered to appellee. Issue was joined on the plea of the general issue, and a special plea, alleging in sub-

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stance that plaintiff never had or owned in his own right any shares of stock which he could sell or transfer.

The plaintiff testified that, in a conversation with defendant, "plaintiff offered to put \$100 in the hands of one Randle if defendant would put a price on fifty-three shares of the stock, and either give or take them at the price so put upon them by defendant. Plaintiff put \$50 in Randle's hands who agreed to lend him \$50 more, and on this being done defendant said he would price at ninety cents on the dollar" on terms stated. Plaintiff then said "defendant could take his stock, at that price, to fifty-three shares. Defendant *nodded*, but said nothing. Plaintiff then remarked to Thomason, who was secretary of the company, to fix up the papers, but being interrupted by supper, the parties went to the supper-room. On coming out, plaintiff again told Thomason to fix the papers, whereupon defendant said 'it was time to stop this foolishness, it had been carried far enough,' and nothing further was said or done except that defendant refused to enter into any writings." The plaintiff further testified, on cross-examination, that he had never transferred any stock to defendant or delivered any certificate to him, and had done nothing more than is stated above. The rules and by-laws of the company required stock to be transferred on the books of the company. This was about the substance of all the proof as to the alleged transfer. After this the plaintiff offered to read in evidence a certificate of stock for eighty-six shares in said company. This certificate is fully described in the opinion. On the defendant's objection the court refused to permit the certificate to be read to the jury. Plaintiff duly excepted to this ruling, and in consequence thereof was "compelled to take a nonsuit, with bill of exceptions, and leave to move to set the nonsuit aside," &c.

The ruling excepted to is now assigned for error.

W. H. DENSON, for appellant.

W. H. BARNES, *contra*.

JUDGE, J. — All that is required by the common law to give validity to a sale of personal property is the mutual assent of the parties to the contract. If it is agreed that one party shall transfer to the other, for a valuable consideration, the absolute property in the thing sold, the contract is complete and binding on both parties. But if, by the terms of the agreement, some material act connected with the subject-matter of the contract remains to be done before delivery, the property sold does not vest in the buyer until the performance of such

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act. *Magee v. Billingsley*, 3 Ala. 679; Benj. on Sales, 3. In such case the agreement is executory, and non-performance by either party may authorize an action for its breach.

In the aspect of the present case we are relieved from all consideration of the question as to whether the evidence shows that any contract at all was made between the parties, and if it does, whether it was an executed contract or an executory agreement. These are always questions of fact to be determined by the jury, under instructions from the court, unless the contract be in writing. No action was had in the court below upon the evidence introduced; consequently there is nothing connected with it for our revision. The only question we are called upon to decide is, whether the court below erred in refusing to permit the plaintiff to introduce in evidence the certificate of stock in the Rock Mills Manufacturing Company; which refusal of the court caused him to take a nonsuit with a bill of exceptions.

This certificate of stock was for eighty-six shares in said company, in favor of "Caroline E. Darden and George W. Darden, the wife and son of W. C. Darden, and all the heirs of W. C. and Caroline E. Darden," which shares were declared to be transferable only on the books of the company upon the surrender of the certificate.

As we understand the bill of exceptions, the fifty-three shares of the stock alleged by the plaintiff to have been sold to the defendant are a part of the eighty-six shares named in the certificate. The plaintiff stated in his testimony that he had no authority to sell or dispose of the same, other than that of being "the husband and father of the parties," in whom the property in the stock was vested, as shown by the certificate.

The court committed no error in excluding the certificate as evidence. It showed upon its face that the plaintiff was not authorized to sell or dispose of any of the stock named therein, and it would have been irrelevant, and was consequently incompetent evidence under the issues joined.

Let the judgment of the circuit court be affirmed.

Doe ex dem. Hamilton et al. v. Hardy.

Ejectment.

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1. *Decedent's land; jurisdiction of probate court over.* — The jurisdiction of the probate court to order a sale of a decedent's lands for payment of debts is *in rem*, and attaches upon the filing of an application by a proper party alleging a statutory ground of sale.

2. *Order of sale; what will not invalidate, on collateral assault.* — Looseness or inaccuracy of pleading in the allegation of jurisdictional facts, which would be bad

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on demurrer, but capable of amendment, while the proceedings are *in fieri*, will not avoid the decree of sale when collaterally assailed.

3. *Same.* — A decree of sale cannot be avoided, on a collateral attack, because the lands were described, both in the petition and order of sale, merely by section, township, and range. In such a case it is admissible to show by parol that the lands lay within the jurisdiction of the court.

4. *Title of heir; when divested.* — The title of the heir to lands of the ancestor, sold by order of the probate court for payment of debts, is not divested until the administrator, in accordance with an order of court, conveys title to the purchaser, and without such title the purchaser cannot defend ejectment by the heir.

APPEAL from Circuit Court of Elmore.

Tried before Hon. J. Q. SMITH.

This was an action of ejectment brought by appellants against the appellee.

Appellants are the only heirs of Daniel Hamilton, who at the time of his death in 1860 was seised and possessed of the lands sued for. T. T. Wall was appointed administrator, and on the 25th June, 1860, he filed his petition in the probate court to sell the lands, describing them simply by section, township, and range, without stating in what county or land district they were situate or otherwise identifying them, and the order of sale follows the description given in the petition. The administrator alleged in his petition that "the personal property belonging to said estate (except slaves) is insufficient to pay the debts thereof, and therefore prayed a sale for that purpose, believing that it would be more advantageous to the interests of said estate to sell lands than slaves. On the 13th day of August, 1860, the day set for the hearing of the petition, an order of sale on twelve months' credit, in the mode provided by law, was granted. The order of sale after showing the appointment of a guardian *ad litem*, &c., recites that the necessity for the sale "is proven to the satisfaction of the court by the oaths of Williams Connoy and William A. Wilson, who are disinterested witnesses, and whose testimony has been taken by deposition upon direct interrogatories as in chancery courts." On the 21st day of January, 1861, the administrator reported that on the 10th of September, 1860, he sold the lands at public outcry on a credit until the first day of January, 1861, and that E. S. Ready became the purchaser at the price of \$4,000. The report alleges in general terms a compliance with the statute and decree of sale, but does not affirmatively show that security was taken for the purchase-money. The same day the probate court in a decree, reciting that the sale had been made in compliance with the order, confirmed the sale. There is, however, no report of payment, no application or order to make a conveyance, and no deed from the administrator to Ready. Wall, on his annual settlement in February, 1862, charged himself with the amount of Ready's bid. Ready, in 1862, without having made payment or received a deed, sold and conveyed the lands to said Wall,

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who went into possession thereunder, claiming and cultivating the lands as his own until 1867. In that year Wall sold the lands to defendant for cotton, giving bond to convey title on delivery of the cotton. Wall died in 1868 or 1869 before all the payments were made, and the balance was paid to James Wall, his administrator, who, under order of the probate court, and by virtue of the bond for title, executed a conveyance to defendant Hardy of all title and interest of said T. T. Wall. Defendant entered under his contract with T. T. Wall, and was in possession, claiming the land as his own, at the time this suit was brought on the 20th day of February, 1872.

T. T. Wall made annual settlements in 1862, 1863, and 1864, the last settlement showing the estate indebted to him in a small sum. The estate of Hamilton was duly declared insolvent on the 29th day of January, 1866, and said Wall made a final settlement on the 16th of May, 1866, on which the estate was indebted to him. Many items of the account, however, as is recited in the bill of exceptions, are "for provisions furnished the family of Hamilton at Confederate prices. No administrator *de bonis non* seems to have been appointed, or any further steps taken in the administration of Hamilton's estate. This was all the evidence. The court, at the request of the defendant, charged the jury, if they believed the evidence, they must find for defendant, and refused a written charge, asked by the plaintiff, instructing the jury, if they believed the evidence, to find for them. The charge given and the refusal to charge as requested were excepted to, and are now assigned for error.

FITZPATRICK & GOLDTHWAITE, and R. M. WILLIAMSON, for appellants.—I. The legal title to, and the right of the immediate possession of the lands sued for, were cast upon Hamilton's heirs on his death. 12 Ala. 534; 15 Ala. 582; 21 Ala. 406. The legal title being in the heir, if his entry is not barred by some intervening particular estate or statute of limitations, he must recover *at law* despite the equitable rights of the defendant. 15 Ala. 413; 18 Ala. 185; 16 Ala. 717; 17 Ala. 412. No proceeding in the probate court short of payment, order to convey, and conveyance under order of court, could divest the title out of the heir. Section 1772 Code of 1852; 1 Ala. 481; 19 Ala. 367; 6 Ala. 413. The right of the administrator to rent lands makes it necessary that he should have *possession*, and from this flows his right to maintain ejectment. 24 Ala. 129; 10 Ala. 60. Possession by the heir is not incompatible with the proceeding to sell; the sale being a judicial sale the purchaser's title is not affected by want of possession by the administrator. 23 Ala. 419. The

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administrator of an insolvent estate could not maintain ejectment (until a statute conferred the power) because he had no authority to rent. 21 Ala. 419. The power to sell existed as fully before authority to rent was given as it does now. If an *application* to sell defeats the heir's title, it must have been equally so under the old statutes. As already shown, the power to rent does not affect power to sell; and to say that because the administrator may maintain ejectment to exercise his power to rent, that therefore his *application to sell* must have an effect denied it before power to rent was given, is a perfect *non sequitur*. No estoppel can be sustained, in this proceeding, because the administrator was charged with Ready's bid. 34 Ala. 591. A purchaser at administrator's sale, before conveyance ordered and executed, is in no better plight than that of a purchaser with bond for titles, who, although he may have paid the purchase-money, cannot defend ejectment by the vendor. 33 Ala. 91; 22 Ala. 207; 17 Ala. 749; *Ib.* 411.

II. The sale is void. The lands are not described so as to enable any court to ascertain where they lie. 25 Ala. 482; *Smitha v. Flournoy*, and *Mosely v. Turnipseed*, do not apply. In those cases facts were stated from which the court could judicially know the location of the lands. The statement that the necessity for sale was proven by deposition taken as in chancery cases, &c., is insufficient. It is a mere conclusion of law — drawn by a court of *limited* jurisdiction. 40 Ala. 252; 36 Ala. 604.

WATTS & TROY, and SUTTLE & KYLE, *contra*. — I. The question in this case is narrowed to this: Had the heirs of Hamilton, at the commencement of the suit, the legal title and the right of immediate possession of the lands? Under our statutes the lands descend to the heirs only *sub modo*, not absolutely and *eo instanti* as at common law. The title descends to the heir subject to the *paramount right* of the administrator to sell for payment of debts, division, &c. 10 Ala. 50; *Patten v. Crow*, 26 Ala. 426. The administrator's right for either purpose, under our statute, is *paramount* to the heir's. The rents must go to him if he requires it. He may maintain ejectment to recover lands against heirs or third parties. 26 Ala. 426; 10 Ala. 493; 41 Ala. 292; 45 Ala. 272; 36 Ala. 348. The only logical vindication of the power of the administrator of a solvent estate to maintain ejectment by force of his statute powers over the real estate is, that whenever he claims rent or undertakes to sell for payment of debts the *legal title*, with right of possession — right of entry — is vested in him. Without this, ejectment cannot be maintained. 30 Ala. 211. If the legal title be only *suspended* by the assertion of

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the statutory power by the administrator, the heir's right of entry — his right of immediate possession — certainly must be *divested* when the administrator asserts his rights. Else how can the administrator maintain ejectment, without either legal title or right to possession? To allow the heir to bring ejectment against the purchaser where the administrator has exercised his paramount statutory right over land and sold it on a credit, is to allow the subordinate right to annihilate the paramount right, and plainly tends to defeat the very purposes of the statute giving the paramount rights to the administrator, who is a trustee for creditors, whose rights are higher than those of the heirs. The case of *Wallace's Heirs v. Hall* (19 Ala.), and the case of *Walker v. Murphy* (34 Ala. 591), are not inconsistent with these views. The commissioners under the old statutes were "mere officers of court," not possessing the power of the administrator. The old statute expressly declared title should not pass until deed made, and these decisions were made under it; since then the administrator's powers have been greatly enlarged.

II. *Smitha v. Flournoy* (47 Ala.) disposes of the objection as to description of the land; even if it did not, plaintiff must recover on the strength of his own title. The decree reciting the necessity for sale was proved by deposition taken as in chancery, &c., is sufficient on collateral attack. 28 Ala. 218; *Satcher v. Satcher*, 41 Ala. 26; 7 Ala. 584; *Smitha v. Flournoy*, *supra*.

BRICKELL, C. J. — The jurisdiction of a court of probate to decree a sale of lands descended to heirs is statutory. It is *in rem*, not *in personam*, attaching whenever an application is made by a proper party disclosing the existence of facts authorizing the decree. Jurisdiction having attached, errors or irregularities intervening in the course of the proceeding do not affect the validity of the decree, when collaterally assailed. The decisions on this point are numerous, and too well known and recognized by the profession, to require a citation of them.

There are doubtless errors and irregularities in the proceedings of the court of probate, on which a decree for the sale of the premises in controversy was rendered, which would have compelled an appellate tribunal to reverse it. The petition is loosely drawn, and could not on demurrer be deemed pleading, averring the facts on which the jurisdiction of the court depends. Its insufficiencies and defects are all amendable, and could have been cured while the proceedings were *in fieri*. Amendable defects of this character cannot, when the decree

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is collaterally assailed, justify a sentence of nullity. Before such sentence is pronounced, the want of jurisdiction, not its irregular exercise, should be manifest. The adoption of any other principle would impair the value and dignity of judgments, and would practically nullify the statutes which prescribe a short period as a bar to an appeal or writ of error to revise them.

The appellants insist the decree of sale is void, "because the petition failed to describe the lands accurately. The description being only by section, township, and range, the court could not know that they were in this State even, or if in the State, in what land district or county." The inaccuracy exists not only in the decree, but in the application for the sale, and the record does not supply the evidence to correct it. This objection was capable of amendment, while the proceedings were in progress to a final decree, and could have been made a ground of reversal on appeal to this court. If an appeal had been prosecuted, and the decree reversed because of this defect, the cause would have been remanded to the court of probate, and an amendment would then have been allowed curing the defect. If a deed or grant had the same defect apparent on its face, and it became necessary to identify the premises, parol evidence would have been received to show the true location of the premises. The same evidence is admissible now, to show that the lands ordered to be sold are within this State, and of consequence within the jurisdiction of the court. If the lands ordered to be sold in fact lie without the State, the decree is a mere nullity, not casting a cloud on the title of the heirs. This objection has several times been preferred to this court, as a cause for invalidating decrees of sale, rendered by courts of probate, and has been invariably repudiated. *Smith v. Flournoy*, 47 Ala. 345; *De Bardelaben v. Stoudenmire*, 48 Ala. 643; *Mooney v. Turnipseed*, January term, 1873; *Wright v. Ware*, June term, 1873. There would be but little security in judicial sales, and in titles resting upon them, if they could be avoided because of such defects, which would have been matter of correction of course and of right, at any time before the sale was decreed. The statute now furnishes an easy and expeditious remedy for the correction of such defects after the sale, whenever they are discovered. R. C. § 2128.

The decree is assailed, not because it does not show that the ground of sale was proven by depositions taken as in chancery cases, for the decree expressly recites, that the necessity of sale is "proven to the satisfaction of the court by the oaths of Williams Conoway and William A. Wilson, who are disinterested witnesses, and whose testimony has been taken by depo-

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sitions upon direct interrogatories as in chancery courts," but because the decree "fails to show the facts from which the conclusion results that the evidence on which it was based was taken as in chancery proceedings." In other words, that the statement that the depositions were taken as in chancery courts is the statement of a conclusion from facts, and not a fact, and that the court should have stated the particular facts, that it might be ascertained whether the proper conclusion was drawn. There is no merit in the objection. The court certainly had jurisdiction to ascertain and declare whether the depositions were taken in conformity to the mode of taking depositions prevailing in courts of chancery. It has exercised the jurisdiction, ascertained and declared the fact, and its determination cannot be collaterally impeached.

The objections urged to the sale and its confirmation, all refer to matters occurring after the jurisdiction of the court had attached. The most that can be said for them is, that they are errors or irregularities. Certainly they are not an excess or usurpation of jurisdiction, which would affect the decree of sale collaterally. If they exist, and are prejudicial to any party in interest, there are remedies appointed by law for their correction.

It does not appear from the record that the administrator had reported to the court of probate the payment of the purchase-money, nor that the court had directed a conveyance of the title to the purchaser, or that such conveyance had been made. Until a report of the payment of the purchase-money, an order of the court of probate directing a conveyance and a conveyance in pursuance of such order, the legal title to lands descended remains in the heirs, who may maintain ejectment for their recovery. This has been too often asserted by this court to be regarded as an open question. *Lighfoot v. Lewis*, 1 Ala. 475; *Cummings v. McCullough*, 5 Ala. 324; *Bonner v. Greenlee*, 6 Ala. 411; *Wallace v. Hall*, 19 Ala. 367. These decisions rest upon the clear ground, that the legal title to the estate cannot be in abeyance. On the death of him in whom it resides, it descends to his heirs, or passes to his devisee, and there resides until divested by an appropriate judicial proceeding, which invests it in another, or is transferred by alienation. A judicial proceeding does not operate its divestiture until another is clothed with it. A conveyance decreed and executed is essential to the investiture of another.

In the absence of evidence that there had been a decree of the court authorizing a conveyance to the purchaser, and a conveyance executed in pursuance of such decree, the appellants were entitled to a recovery on their legal title. If there

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are equities resting in the purchaser which will render the recovery valueless to them, they must be asserted in a court of equity — of them a court of law cannot take cognizance.

The court erred in the charge given, and in the refusal to charge as requested, and the judgment must be reversed and the cause remanded.

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JUNE TERM, 1875.

Wilson v. The State.

Indictment for Illegal Voting.

1. *City court of Mobile ; power to hold special terms.* — The city court of Mobile has authority to hold, by special adjournment, such terms as may be necessary for the dispatch of business, and at such special term may exercise its full criminal jurisdiction, including the origination of a grand jury, if, in its judgment, the public good requires it.

2. *Indictment for illegal voting ; what sufficient.* — An indictment, under the "Act to regulate elections in the State of Alabama," approved April 23, 1873, charging the defendant with having "voted more than one time" at a general election, held on a given day, in a particular county, is not demurrable because it fails to allege the names of the persons or officers for whom the defendant voted, nor subject to demurrer on other grounds.

3. *Witness ; putting under rule.* — An order putting witnesses under the rule is discretionary with the court, but should seldom, if ever, be refused when applied for. It is in the discretion of the court to permit or refuse the examination of a witness who violates the rule, and the exercise of this discretion is not revisable ; but a witness should not be excluded merely because he has heard the reading of the indictment or pleadings.

4. *Vote ; what best evidence of.* — The poll-lists are the highest and best evidence of who voted at an election ; and when it does not appear from them that the defendant voted in his real name, or in the name by which he is indicted, or that there is a name on the poll-list representing the ballot cast by him, there can be no conviction for illegal voting.

APPEAL from City Court of Mobile.

Tried before Hon. O. J. SEMMES.

The opinion states the case.

ALEXANDER MCKINSTRY, for appellant, cited the acts creating the court, and from time to time enlarging its jurisdiction, and contended that under them the court had no power

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to originate a grand jury at a special term. *O'Byrne v. State*, in MS.

II. All the counts of the indictment were obnoxious to the grounds of demurrer assigned. 6 Ala. 664; 15 Ala. 259; 29 Ala. 27; 1 Arch. Crim. Law, § 68. No form of indictment being given, the offence should be described with the certainty requisite at common law. 18 Ala. 535; 24 Ala. 672; 33 Ala. 398; Rev. Code, § 4120. It was uncertain as to whom the defendant voted for; whether twice for one officer, or for two persons for the same office. 4 R. I. 269; 9 Miss. 417; 7 Met. 52.

III. The charge given, as to the non-production of the poll-list, was erroneous. Under the election law sworn officers are required to make a *record* of the ballots cast. That was the highest and best evidence of defendant's having voted. Until its loss or destruction was shown, it could not be proved *aliunde* that defendant had voted. 2 Stewart & Porter, 348.

JOHN W. A. SANFORD, Attorney General, with whom were T. N. MCCARTNEY and GAYLORD B. CLARK, *contra*. — I. The court had undoubted power to summon a grand jury, if deemed advisable. *Levy v. State*, 48 Ala. 171; *Nugent v. State*, 19 Ala. 540.

II. The indictment was sufficient. Several of the counts are in the exact language of the statute and charge all the constituents of the offence. *State v. Boyington*, 56 Maine, 512; 15 Iowa, 123; 1 Bish. Crim. Proc. §§ 267-8. The term "vote" *ex vi termini* shows that the accused expressed his mind, his will, or choice for an office which was to be filled; it was needless to charge that the ballot was cast wilfully, corruptly, &c.

III. The statute construed in 2 Stewart & Porter, 348, is unlike the present law. The election law itself only makes the poll-list evidence in the case of a contested election. The office of manager was of higher dignity under the old statute than under the new. Under the old law the duties of the managers were in their nature judicial, and this fact influenced the decision in 2 Stewart & Porter.

BRICKELL, C. J. — The city court of Mobile was originally established as a criminal court only, having in Mobile county jurisdiction concurrent with the circuit court, "in the administration of the criminal law." Pamph. Acts 1845-46, p. 29, § 4. It was authorized at stated times to hold three regular terms annually, and by *special adjournment*, "such other terms as may be necessary for dispatch of business." *Ib.* 53. The times of holding the regular terms were, from time to time,

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changed by legislative enactments, and civil jurisdiction, except in actions involving the title to lands, was conferred on it. Pamph. Acts 1849-50, p. 36, § 43; Acts 1851-52, p. 75, § 1. In 1858, it was invested with authority to hold special terms by order of the judge, when necessary for the trial of criminal causes, and to deliver the jail of all persons charged with crimes and misdemeanors. Pamph. Acts 1857-58, p. 57, § 3. In 1868, it was divested of civil jurisdiction, and remitted to its original criminal jurisdiction. Pamph. Acts 1868, p. 413, No. 56. Its civil jurisdiction was restored by the act of 1872. Pamph. Acts 1871-72, p. 109, No. 78. It is apparent from a careful examination of the several statutes, that neither by implication or express provision has the authority of the court, to hold by special adjournment such terms as may be necessary for the dispatch of business, been taken away or impaired. The power remains to be exercised by the court, whenever in a sound discretion the public good requires its exercise. The term of the court, held on the 18th November, 1874, entitled a *special adjourned term*, at which the indictment was found against appellant, was held under an order made in term time, and of consequence was an authorized term of court. At such term, the full criminal jurisdiction of the court could be exercised. Whatever power it could properly exercise at a regular term (by which is intended only a term commencing at the time fixed by law), could be exercised at this adjourned term. *Nugent v. State*, 19 Ala. 540; *Harrington v. State*, 36 Ala. 236. At such a term, the court has power to originate a grand jury, if the public good requires it. R. C. § 4085. *Nugent v. State*, *supra*; *Harrington v. State*, *supra*; *Levy v. State*, 48 Ala. 171. The grand jury presenting the indictment against appellant was not of consequence summoned and empanelled without warrant of law, as is here insisted, but was a legal body, a lawful constituent of the court, charged with the power it exercised. The case of *O'Byrne v. State* (January term, 1874) is not at all inconsistent with this opinion. In that case, a grand jury for a regular term of the court had been drawn and summoned in the mode prescribed by law, and so far as the record disclosed, were *probi et legales homines*; yet, the judge of the city court on a fact resting in parol, of which he could not have judicial knowledge, assumed to set aside the panel, because particular individuals on it had, in his judgment, disqualified themselves from sitting to inquire as to a particular offence, which he supposed the jury could be called to investigate. There was no other term which was descriptive of the judge's action than usurpation. Usurping the power to set aside the panel, the administration of the criminal law must have been superseded, or he must usurp the power of originating a grand jury. This

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power is intrusted by our law to the court only in clearly defined cases. Of these cases is the organization of a grand jury at a special term, if the public good requires it. R. C. § 4085. This is the power the city court exercises. The necessity for its exercise was not created by an unwarrantable action of the court, but sprung from public necessity.

The 40th section of the act of April 22d, 1873, entitled "An act to regulate elections in the State of Alabama," declares, "that any person voting more than once at any election held in this State, or depositing more than one ballot for the same office as his vote at such election, or is guilty of any other kind of illegal or fraudulent voting, shall be deemed guilty of a felony," &c. Pamph. Acts 1872-73, p. 25. The 30th section declares that at all elections the elector must vote by ballot, and the 31st section, that the ballot must be a white paper ticket, on which must be written or printed, or partly written or partly printed, the names for whom the elector intends to vote, and must designate the office for which each person so named is intended by him to be chosen." *Ib.* 23.

The indictment contains three counts. The first charges the appellant with having voted *more than one time* at the last general election. The second charges that at this election, having voted by ballot, once at the sixth ward polls in the city of Mobile, he voted a second time, by ballot, at the seventh ward polls in said city. The third charges that he voted more than once, at said election, by ballot, voting one time at the sixth, and one time at the seventh ward in said city. The difference in the counts is, that the first is a general charge of voting more than once, without naming the places at which the votes were cast, and how cast, whether by ballot or otherwise. The second is more specific, averring the voting was by ballot, and that the first vote was cast at one polling place and the second at another. The third count varies from the second in omitting the order in which the two votes were cast. To each count a demurrer was interposed, and the cause assigned is, that the offence is not described with sufficient certainty, nor the persons or offices for which the votes were given. The demurrer was overruled.

The offence denounced by the statute, and intended to be described in the indictment, is voting more than once. An indictment for a statutory offence is generally sufficient, when it is framed in or pursues the words of the statute. The exception is, if thereby the fact, in the doing or omission of which the offence consists, is not directly and explicitly averred. Voting more than once, at an election held in this State, is the fact constituting the offence. The times of holding the general elections are prescribed by law, and are judicially known. When the indictment charges that at a general election held at

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a particular time, the defendant voted more than once, the court can from the averment determine whether it was a general election, held under authority of law, and knows what officers were to be chosen, and what officers were of necessity voted for. The averment that he voted includes in itself the fact that the vote was by ballot, for in no other way could he have voted, and proof of voting in that way is indispensable to satisfy the averment. We therefore conclude that pursuing the words of the statute as the indictment does, it is sufficient. It was not necessary, if it had been possible, to aver for whom the appellant voted. The presumption from his voting is, that the ballot designated for whom he voted; if it did not and was a blank, or designated particular persons as voted for to fill offices, not to be filled at the election, so that the double voting did not affect the result of the election, this was matter of defence, to be introduced by the defendant in exculpation. *State v. Minnick*, 15 Iowa, 123; *State v. Boyington*, 56 Maine, 512. One of the reasons for requiring a vote to be given by ballot, rather than *viva voce*, is the privacy attending it. The elector is not to be subjected to the necessity of making public for whom he votes. Thereby he is supposed to be left freer and more independent in the exercise of his high privilege. Against any invasion of the privacy of the ballot the law diligently guards. It is only when it may be necessary for the prevention of fraud, or the induction into office of one not really elected by the qualified voters, that an inspection of the ballot can be had. It would not be in accordance with the policy of the ballot system to require that an indictment for illegal voting should aver for whom the vote was cast, or that proof of the fact should be made by the State. It is not the fact for whom he voted, but that he voted more than once, that constitutes the offence. He may have voted once for each of the opposing candidates, and thereby, as to the result of the election, have rendered the votes blanks, and yet he would be guilty because the letter and spirit of the law would be violated. The purity of the ballot-box would be endangered, and elections subjected to the hazards of being thwarted by fraudulent conduct of the electors.

Putting witnesses under the rule, or examining them out of the hearing of each other, is not a matter of right in parties, but rests in the sound discretion of the court. The order for such examination may be made by the court of its own motion, if deemed essential to the discovery of the truth, and should rarely if ever be withheld, when moved for by either party. If the rule is made, and a witness remains in court in violation of it, intentionally or by mistake, it is discretionary with the court to permit or refuse his examination, and the exercise of

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the discretion is not revisable. 1 Green. Ev. § 482; *State v. Brookshire*, 2 Ala. 303. If the witness Calhoun had been within the rule, we could not revise the action of the court in permitting his examination. He was not, however, within the rule. He had not heard any of the evidence introduced on the trial, and the rule does not contemplate the exclusion of a witness because he may have heard the reading of the indictment or other pleading in the cause.

The statute required that three inspectors should be appointed to attend and conduct an election, at each precinct or ballot-box, and the appointment of two clerks. When a vote was cast, one of the inspectors must have received it, and distinctly and audibly called the name of the voter, which the clerks were required to enter on separate lists called "poll-lists," and the ballot numbered with the number corresponding to the number of the voter's name on the "poll-lists." Pamph. Acts 1872-3, p. 21, § 26; p. 21, §§ 32, 33. The poll-lists of the seventh ward were not introduced by the State, but by the defendant, and his name did not appear upon them. Neither the inspectors nor clerks of either of the polling places, at which it is alleged the defendant voted, were introduced as witnesses; but the State proved by witnesses that they saw the defendant vote at each of the polling places. The court charged the jury, that it was not material nor necessary for the State to introduce any of the inspectors, and that the poll-lists were of no peculiar value as evidence, and had no higher grade than oral evidence.

The present statute is not materially variant from the acts of 1815 and 1819. Aik. Dig. p. 138-142. The duties of inspectors and clerks were defined under those statutes, and the mode of voting prescribed, as defined and prescribed in the statute of 1872-3, under which the indictment is found. Under those statutes, illegal voting, whether committed by voting more than once, or voting without the requisite qualifications, was punishable by a pecuniary penalty, recoverable by a *qui tam* action. In *Blackwell v. Thompson* (2 Stew. & Port. 348), which was a *qui tam* action for voting at an election without legal qualifications, it was held, the act of voting was not complete until the ballot was deposited in the box, and the name of the voter entered on the poll-lists kept by the clerks; and that before a conviction could be had, the poll-list, which was the highest evidence of the vote, must be produced, or account given of its absence. The poll-lists are required to be made and kept for the express purpose of showing who are the voters at an election. They are made by sworn officers, under the supervision of sworn officers, while the act of voting is being done, and as evidence of the act; of consequence, they

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are the highest and best evidence of who are the voters at an election, as a written contract is the highest and best evidence of the agreement of parties, or the return of an executive officer is the highest and best evidence of his official act. It may be, as was suggested in argument, that a person voting illegally would vote in a fictitious, not in his real name, and of consequence his real name would not appear on the poll-lists. The fictitious name would appear, and the party indicted could by parol be identified as the person represented on the poll-lists by the fictitious name.

If it does not appear from the poll-lists that the defendant voted in his real name, or in the name by which he is indicted, nor that there is a name on the poll-lists representing the ballot cast by him, the offence of illegal voting has not been committed. A ballot found in the ballot-box, without a name on the poll-lists corresponding to it or with which it could be connected, could not be counted as a vote, could not affect the result of an election, and would be no more than a blank piece of paper. To sustain the charge against the defendant, it was indispensable to produce the poll-lists, and to have shown that on them appeared the name of the defendant as casting two votes, on names which he gave or recognized as his, corresponding with ballots received from him and deposited in the ballot-box. The charge given was therefore erroneous, in asserting the poll-lists were of no value as evidence, and were of no higher grade than oral evidence. It is not necessary to notice the refusals to charge as requested by the appellant. For the error in the charge given, the judgment of conviction is reversed and the cause remanded. The defendant will remain in custody, until discharged by due course of law.

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Indictment for Murder.

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1. *Declarations of the deceased; when not part of the res gestæ.* — Declarations or statements made by the deceased, in the absence of the prisoner, while walking to a church, at which he was killed that night, about fifteen minutes after his arrival, as to why he had not killed the prisoner in a difficulty which had occurred between them on the afternoon of the same day, are not admissible evidence against the prisoner on trial for the murder of the deceased.

2. *Illegal evidence; admission of; when fatal.* — Where illegal evidence has been admitted a reversal must follow unless the court can clearly see that the illegal evidence could not prejudice the defendant.

APPEAL from Circuit Court of Lauderdale.

Tried before Hon. W. B. WOOD.

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The appellant was indicted for the murder of Coleman Williams. On the trial the State offered to prove by Frances Moore, a witness who accompanied deceased to a church where he was killed in about fifteen minutes after his arrival, that in a conversation on the way, relative to a difficulty between deceased and prisoner on the evening of the same day, deceased said prisoner had insulted him and threatened to kill him, and on being asked why he did not kill deceased, replied that "he was unwilling to take away from him what he could not give." The court overruled an objection to this testimony, and the defendant duly excepted. It was further shown that on the occasion of the previous difficulty the deceased remarked that he was satisfied, but defendant replied: "D—n you; I'll kill you to-night, and that between sunrise and dark." The testimony does not show who was the aggressor in the fatal encounter.

The admission of the conversation objected to is now urged as error.

O'NEAL & O'NEAL, with whom were C. H. PATTON, J. B. MOORE, and JAMES JACKSON, for appellant. — I. The conversation of the witness with the deceased constituted no part of the *res gestæ* and hence was inadmissible. 1 Phillipps on Evidence, 185, 4th Amer. ed.; 1 Starkie on Evidence, 47 *et seq.*, 3d Amer. ed.; 1 Greenleaf on Evidence 108, 12th edition; *Chaney v. State*, 31 Ala. 342; *Commonwealth v. Harwood*, 4 Gray 41; *Tompkins et al. v. Reynolds*, 17 Ala. 109; *Kennedy v. Meador*, 1 Stew. & Porter, 220; *Gandy v. Humphries*, 35 Ala. 617. Declarations which relate to past transactions, not involving the main issue, are not admissible. *Spivey v. State*, 26 Ala. 9.

JOHN W. A. SANFORD, Attorney General, *contra*. — The conversation should have been admitted, as it was so near the time of the killing as to preclude the idea of deliberate design, and to render it practically contemporaneous with it, and constitutes part of the *res gestæ*. *Mitcheson v. State*, 11 Geo. 615; *Hadley v. Carter*, 8 N. H. 40; *Roulhac v. White*, 9 N. C. 63.

The conversation preceding the homicide contained sentiments that tended to show the character of the deceased. And this could be considered for the purpose of ascertaining the degree of criminality of the accused. *Fields v. State*, 47 Ala. 607.

MANNING, J. — In *Burns v. The State* (49 Ala. 370), it was held that evidence was admissible of declarations of de-

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ceased made when leaving his home to go where he expected to meet and did meet his slayer, indicating a purpose to attack the latter, and to the effect — that when next heard from one or the other would be dead ; he having been killed in the encounter that ensued shortly afterwards, without any witness to prove who was the aggressor. The declarations (say the court) “are admissible only to show the mental *status* of the deceased and his motive in inviting an interview with the prisoner. If there is no evidence of the facts attending the killing, this evidence may enable the jury to determine who was the aggressor, and may properly generate a doubt of the guilt of the accused.”

But it is to be observed in regard to this case, which resembles the cause before us, — that the declarations (first) related to a rencounter then sought and anticipated, in which the speaker who made them was slain ; and (secondly) that they were of such a nature as that if he had been the slayer, instead of the slain, they would have been evidence against him — to show malice. They were inculpatory, and, therefore, clearly not spoken to deceive.

In the present case, the remarks made by the slain not long before his death, in a conversation with a lady with whom he was walking to church, related to a rencounter that had taken place about an hour before. In reply to a question why he did not kill his adversary, he gave utterance to the manly and generous sentiment : “I was unwilling to take away from him what I could not give.” If, however, in the contest that soon after followed, he had been the slayer instead of the slain, this reply would not have been admissible for his defence.

Declarations of a person accused of a crime, in his own behalf or to his own advantage, are allowable evidence for him only when a part of the *res gestæ*. If this were not so, under the rule allowing them, exculpatory declarations might be introduced, which a crafty man, seeking an opportunity to kill with impunity another to whom he was an enemy, might take occasion to make in order that they should be proved in his defence, to deceive the jury trying him.

The same principle which would prevent such declarations from being proved in defence of the person making them, if by his hand his adversary had fallen, prevents the introduction of them as evidence against his adversary, if he be the slayer. They may have been uttered for the very purpose of casting suspicion and blame upon the latter ; and his case ought not to be prejudiced by such testimony.

The evidence of the remark made by the deceased to the lady he was walking with was as unnecessary as inadmissible. It could not add any weight to the evidence already introduced

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of his pacific disposition and unwillingness to engage in a mortal contest. Yet we cannot know that the evidence did not materially affect the verdict of the jury; and the judgment must therefore be reversed, and the cause remanded.

The defendant must remain and be kept in custody until discharged by due course of law.

Gordon v. The State.

Indictment for Illegal Voting.

1. *Indictment for illegal voting; sufficiency of.* — A count of an indictment, framed under § 40 of the act to regulate elections, &c., approved April 22, 1873, charging that the defendant, not being twenty-one years of age, voted at a given general election held in this State, is sufficient; but a mere general accusation of illegal voting, without specifying in what the illegal voting consisted, is not sufficient to support a conviction.

2. *Minor; when cannot be convicted of illegal voting.* — A minor, who is otherwise duly qualified, cannot be convicted of illegal voting because he was not of the requisite age, if he voted under the honest belief, induced by information from parents, relatives, or acquaintances having knowledge of the time of his birth, that he had obtained his majority.

3. *Same; mistake of fact as to age, &c., when no excuse.* — If one votes recklessly or carelessly, when the facts are doubtful or uncertain, his ignorance will not excuse him, if in fact he was not qualified; and whether the defendant acted honestly on diligent inquiry, or recklessly without proper care to learn the facts, is a matter which should be left to the determination of the jury.

APPEAL from Circuit Court of Henry.

Tried before HON. J. MCCAULEY WILEY.

The opinion states the case.

J. H. COWAN, for appellant. — Honest ignorance of fact, without fault on defendant's part, will excuse what would otherwise be an offence. It negatives a criminal intent. 2 Bish. Crim. Law, § 276.

JOHN W. A. SANFORD, Attorney General, *contra*, cited *Schuster v. The State*, 48 Ala. 199.

BRICKELL, C. J. — This indictment is founded on the fortieth section of the statute, approved April 22, 1873, entitled "An act to regulate elections in the State of Alabama," which declares: "That any person voting more than once at any election held in this State, or depositing more than one ballot for the same office at such election, or is guilty of any other kind of illegal or fraudulent voting, shall be deemed guilty of a felony," &c. Pamph. Acts 1872-3, p. 25. The first count charges that the appellant, not being of the age of twenty-one years, voted at the last general election in this State. The

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second count is a general accusation of illegal voting, not specifying in what the illegality consisted, whether in a want of legal qualification, or in voting more than once, or in depositing more ballots than one, and is not sufficient to support a conviction. 2 Bish. Cr. Pr. § 275. The evidence, as disclosed in the bill of exceptions, tended only to support the charge contained in the first count. Two witnesses were examined on the behalf of defendant; one, his mother, and the other an acquaintance who had known him from his birth, and resided in the same neighborhood, and for a long time a member of the same family with defendant, and they testified the defendant was of the age of twenty-one years, in the August preceding the election. That they had frequently told defendant he would be of full age in that month, and subsequently and before the election told him he was of age. The court refused to charge the jury that if the defendant, in reliance on these statements, honestly believed he was of full age when he voted, he should not be convicted, if the evidence convinced the jury he was not of age.

“All crime exists, primarily, in the mind.” A wrongful act and a wrongful intent must concur, to constitute what the law deems a crime. When an act denounced by the law is proved to have been committed, in the absence of countervailing evidence, the criminal intent is inferred from the commission of the act. The inference may be, and often is removed by the attending circumstances, showing the absence of a criminal intent. Ignorance of law is never an excuse, whether a party is charged civilly or criminally. Ignorance of fact may often be received to absolve a party from civil or criminal responsibility. On the presumption that every one capable of acting for himself knows the law, courts are compelled to proceed. If it should be abandoned, the administration of justice would be impossible, as every cause would be embarrassed with the collateral inquiry of the extent of legal knowledge of the parties seeking to enforce or avoid liability and responsibility.

The criminal intention being of the essence of crime, if the intent is dependent on a knowledge of particular facts, a want of such knowledge, not the result of carelessness or negligence, relieves the act of criminality. An illustration may be found in the vending of obscene or immoral publications. A knowledge of the character of such publications is an indispensable ingredient of the offence. From the vending it would be inferable; but if it appeared the vendor was blind, and in the course of his trade happened innocently to make the sale, a want of knowledge of the character of the publication would relieve him from criminal responsibility. A man having in his possession counterfeit coin, or forged bank bills, with intent to put them in

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circulation, could not be convicted of crime, if he was ignorant of their spuriousness. A statute imposed a penalty on the owner or captain of any steamboat receiving and transporting any colored person, without having particular evidence that such person was free. The penalty could be inflicted only on the captain or owner who knowingly transported such person. If the person of color, without the knowledge or consent of the captain or owner, entered the boat, concealing himself, and was thus carried away, the penalty was not incurred. *Duncan v. State*, 7 Humph. 148. Illegal voting, when it is supposed to arise from the want of legal qualifications, is dependent on the voter's knowledge of the particular facts which make up the qualification. Every man is bound to know the law requires that every voter shall be a native born or naturalized citizen of the United States, of the age of twenty-one years, and have resided in the State six months, and the county in which he offers to vote, three months next preceding the election, and must not have been convicted of the offences mentioned in the Constitution as the disqualification of an elector. He is bound to exercise reasonable diligence to ascertain the facts which enter into and form these qualifications. Having exercised this diligence, if he resided near the boundary line of a county, and should be informed by those having the means of knowledge that his residence was within the county, and he, without a knowledge of the real facts, honestly acting on this information, should vote, he could not fairly be charged with illegal voting, though on a subsequent survey, or on some other evidence, it should be ascertained his residence was not within the county. The precise time when a man arrives at the age of twenty-one years is a fact, knowledge of which he derives necessarily from his parents, or other relatives or acquaintances having knowledge of the time of his birth. If acting in good faith, on information fairly obtained from them under an honest belief that he had reached the age, he votes, having the other necessary qualifications, illegal voting should not be imputed to him. The intent which makes up the crime cannot be affirmed. Whether he had the belief that he was a qualified voter, and the information was fairly obtained, should be referred to, and determined by the jury. The whole inquiry should be directed to the voter's knowledge of facts, and to his diligence in acquiring the requisite knowledge. If he votes recklessly or carelessly, when the facts are doubtful or uncertain, his ignorance should not excuse him, if the real facts show he was not qualified. If ignorant of the disqualifying fact, and without a want of diligence, under an honest belief of his right to vote, he should be excused, though he had not the right. 2 Bish Cr. Law, §§ 276-279; *State v. Boyett*, 10 Ired. 336; *McGuire v. State*, 7

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Humph. 54 ; *Commonwealth v. Bradford*, 9 Met. 268 ; *Commonwealth v. Aglar*, Thatcher's Cr. Cases, 412.

The charge given by the circuit court, and several of the refusals to charge, were according to these views erroneous, and the judgment must be reversed, and the cause remanded. The appellant must remain in custody until discharged by due course of law.

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Application for Mandamus.

Habeas corpus ; petition for, what sufficient — A petition for *habeas corpus* containing the statements prescribed by section 4262 of the Revised Code, and verified as required by section 4261, is not demurrable because it fails to allege that the petitioner is illegally restrained of his liberty.

Same ; duty and authority of probate judge — A prisoner, not under indictment, committed by a justice of the peace after preliminary investigation, may apply to the probate judge for a writ of *habeas corpus*, and it is the duty of the judge to hear and pass upon the evidence touching the prisoner's guilt, and to discharge him if it appears that no offence has been committed, or there is not probable cause for charging the prisoner with it.

Same ; practice indicated. — If the prisoner has been committed after investigation before a duly authorized officer, he should not be discharged unless the witnesses previously examined against him, if still living and attainable, are produced and examined. If any material witness, who testified on the examination, is absent on the hearing, the prisoner should not be discharged, but the amount of bail fixed, if the case be bailable, and the prisoner detained until it is given.

THIS was an application by Henry M. Champion for *mandamus* to compel the probate judge of Pike county to hear and determine evidence in regard to the cause of the imprisonment of petitioner, who had been brought before him on *habeas corpus*. The grounds of the motion are fully set forth in the opinion.

JOHN D. GARDNER, for petitioner. — The petition could not be demurrable ; it was properly verified and contained all the allegations required by the Code. *Mandamus* is the proper remedy. 30 Ala. 461. *Ex parte Mahone* (30 Ala. 49) shows that the probate judge had jurisdiction, and that he will be compelled to exercise it by *mandamus*.

JNO. W. A. SANFORD, Attorney General, *contra*.

MANNING, J. — The prisoner Champion, by petition to the judge of probate of Pike county, showed that he was restrained of his liberty in the jail of that county by the keeper thereof, upon a commitment of a justice of the peace charging him with having committed rape,—and prayed that by the

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writ of *habeas corpus* he be brought before said judge to do and receive what should be considered concerning him. The writ was issued, prisoner was brought by the jailer before the judge, and the county solicitor being present, demurred to the petition.

The grounds of demurrer were principally, that it was not averred in the petition, and it did not appear thereby, that the prisoner was illegally restrained of his liberty, but rather the contrary. The judge sustained the demurrer, dismissed the petition and writ of *habeas corpus*, "and refused to hear any witnesses touching the guilt or innocence of the prisoner, or to inquire in any way into the cause of said imprisonment or restraint : to all of which the prisoner excepted."

The petition contains exactly what is prescribed in section 4262 of the Revised Code, and is verified by affidavit according to section 4261. The former section does not require that in addition to the averments made in the petition, it shall also set forth that the prisoner is illegally restrained of his liberty. Of course, though, this must be shown by the evidence, before the magistrate that issued the writ of *habeas corpus* would be justified in discharging the prisoner unconditionally. But is the petition demurrable because it does not assert the innocence of the prisoner, or declare that he is illegally held in custody? This question has not before, we believe, been presented in this court for an answer. But doubtless there is a reason why the statute law, that so particularly, and at so much length, prescribes the process by which any person in confinement shall have the benefit of that great writ of liberty, does not require him to allege that he is illegally imprisoned.

By section 4261 of the Code, the petition in such a case must be sworn to. And the humanity of our law is such, that not only is a person held to be innocent until by some judicial proceeding he has been ascertained to be guilty, but the Constitution further provides, "that he shall not be compelled to give evidence against himself, or be deprived of life, liberty, or property, but by due process of law." To require of a prisoner, therefore, in the petition in which he sets forth that he is restrained of his liberty, — and by whom, and where, and on what pretence he is so restrained, — to say in addition, that he is illegally restrained, and make oath thereto, might be an infringement of his constitutional right to stand unquestioned and presumably innocent in the presence of his accusers. The petition, therefore, was not subject to the demurrer interposed by the solicitor ; and the judge of probate erred in sustaining it, and in thereupon dismissing it and the writ of *habeas corpus*.

The prisoner was in custody upon a warrant of commitment,
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after a preliminary examination, by a justice of the peace; and no indictment had been found against him. When he was brought before the judge of probate upon *habeas corpus*, he was entitled to require of the latter that he should hear and pass upon the evidence in regard to his guilt, — and to be discharged, if it should appear that no offence had been committed, or that there was no probable cause for charging the prisoner therewith. *Ex parte Mahone*, 30 Ala. 49.

Of course on such an examination, the judge making it should be careful to see that the proper legal steps be taken to get all the evidence on the question of the prisoner's guilt. And if the latter had been committed, after a prior investigation by an officer authorized by law to make it, the prisoner ought not to be discharged, without all the witnesses that had been previously examined against him, if still living and attainable, being produced and examined. In the absence of any material witness who previously testified in the examination against him, the question for consideration should relate only to the amount of the bail, if the case be bailable; and if it be not, the prisoner should be remanded by the judge into custody to be safely kept until discharged by due course of law.

Great strictness in the forms of proceedings are not required in cases of *habeas corpus*. Section 4279 of the Revised Code indicates the course that ought usually to be pursued.

Upon the motion of the prisoner, Henry M. Champion, it is ordered that a rule *nisi* be issued from this court to the Hon. URBAN L. JONES, judge of probate of Pike county, requiring him to show cause before this court, on Thursday the 22d day of July instant, why a writ of *mandamus* shall not issue, commanding him to hear the evidence in regard to the imprisonment of said Champion, and to do right and justice in the premises according to law.

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Indictment for Receiving Stolen Goods.

1. *Receiving stolen goods; prosecutor a competent witness.* — The owner of stolen property is a competent witness against a party charged with having receiving it knowing that it had been stolen.

2. *Evidence as to loss of property; what properly received.* — A witness who testified that he had lost cotton from his gin-house is properly permitted to state that he ascertained that fact by a comparison of the weight of the cotton when first put in the house with its weight after being "ginned out."

3. *Leading question to prosecutor; discretionary with primary court.* — It is discretionary with the primary court to permit, or refuse, a leading question to be put by a party to his own witness, and the exercise of this discretion is not revisable.

4. *Excitement of prisoner; what evidence of, inadmissible.* — It is error to allow a

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113	47

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130	14

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134	157

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136	19

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140	121

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witness to state that the prisoner "looked excited;" the signs of excitement should be stated, and the question left for the determination of the jury unbiased by the witness' opinion. Such evidence should always be received and weighed with great caution,

5. *Distinct substantive offence, evidence of, on trial of another; when admissible.* — Evidence of one distinct substantive offence is generally inadmissible on the trial of another, but may be resorted to in some cases: *e. g.*, as where the offence charged and that proposed to be proved constitute but one transaction, or to prove the identity of the offender; where it is necessary to prove a motive, and there is an apparent connection between the criminal act proposed to be proved and that charged; where the accusation involves a series of criminal acts which must be proved to make out the offence; where it is necessary to prove a *scienter*, and the like.

6. *Same; what not admissible in proof of scienter.* — In a prosecution for receiving a sack of cotton knowing it to have been stolen, it is not competent for the State to show, in proof of the guilty knowledge of defendants, that "the week previous to the finding of the sack of cotton in defendants' storehouse, persons had been seen going in just before and about daybreak, with sacks of cotton, and coming out with the sacks empty." Such facts alone, neither show that such sacks of cotton were stolen, nor that defendants knew it when they received them.

7. *Discharge of one of several defendants under section 4192 of Revised Code; action of court under, when not revised.* — Section 4192 of the Revised Code, authorizing the discharge of any one of several joint defendants as to whom there is not sufficient evidence to put him on his defence, imposes delicate and responsible duties, in the exercise of which much must be left to the sound discretion of the lower court. Its action in this respect will not be revised when all the evidence is not set out, or where it is merely stated in general terms.

APPEAL from Circuit Court of Lee.

Tried before Hon. J. E. COBB.

The appellants G. Gassenheimer, S. Gassenheimer, Joseph Gassenheimer, and Dock Bedell, were indicted and convicted for receiving a sack of cotton, the property of J. B. Corr, knowing it had been stolen, &c. The indictment was returned into court on the 7th of November, 1874.

On the trial, the prosecutor Corr, owner of the property alleged to have been stolen, was introduced as a witness. The defendants objected to his testifying on the ground that he was interested in the event of the suit; whereupon Corr, through counsel, announced that he released all right to a judgment for the stolen property, and waived any right to have it incorporated in the judgment for the fine and costs. The court then overruled the defendants' objection and permitted the witness to testify, and the defendants duly excepted. In the course of his testimony Corr testified that he had lost two or three bales of cotton from his gin-house in the fall and early winter of 1874; that he knew this from the way the cotton "ginned out" as compared with its weight when put in the house. "To this answer, and the reasons for it, the defendants objected, and moved the court to exclude them from the jury," but the motion was overruled and they excepted.

The State then asked Corr this question, in reference to the sack mentioned in the indictment: "Did you ever see that sack after you saw it in the Gassenheimers' house?" An ob-

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jection to the question, on the ground that it was leading, was overruled, and the witness permitted to answer against the objection and exception of the defendants.

A state's witness, one Avery, testified that one day in November, 1874, seeing a light burning in Gassenheimers' store an hour before day he went to the house and knocked at the door. J. Gassenheimer, the only person in the house, opened the door, and the witness, on going in, saw three sacks of cotton, including the one afterwards claimed by Corr, whose right to it was disputed by the Gassenheimers. These sacks were full of cotton, and damp on the sides and the top, where the cotton had been exposed to the dew, just as two other sacks were which Corr claimed, which witness found in the street, in the possession of two negro men who ran out of the house as the witness came up. The witness was then asked "how the prisoner J. Gassenheimer looked when you went in?" The defendants objected to this question, but their objection having been overruled, and the witness having answered that Gassenheimer "looked excited," the defendants moved to exclude the answer from the jury, which motion was overruled, and the defendants duly excepted.

The prosecution asked a witness "if he had seen any persons on other nights during the week, before the time testified to by Avery, go into said house of defendants trading," Defendants' objection to this question, because it called for illegal and irrelevant evidence, was overruled and they excepted. The witness answered that "he had seen persons go in there with sacks filled, just before and about daybreak the week previous to the time testified to by Avery, and come out with sacks empty." The court refused to exclude this testimony on motion of defendants, and they excepted.

During the progress of the trial two of the defendants, on the ground that there was not sufficient evidence to put them on their defence, moved the court to direct their acquittal and allow them to testify, &c. This the court refused to do, and they duly excepted. As this court was of opinion that the evidence connecting these defendants with the offence was not stated with sufficient explicitness, it is not necessary to refer to the evidence on this point. The bill of exceptions states that it does not contain all the evidence, but "only so much of it as was deemed sufficient to raise the questions on which the appeal was taken."

The court at the request of defendants gave two charges as to the effect of guilty knowledge proved as to only one of the defendants, but "each time said to the jury, in addition, that they might look to all the evidence to show the knowledge of all the defendants." To the giving of these "additional charges" the defendants excepted.

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The various rulings to which exception was reserved are now assigned as error.

H. C. LINDSEY, for appellants. — 1. The prosecutor was a competent witness. The judgment being the same in this case as in larceny, he was entitled to judgment, on conviction, for the value of his property. The mere announcement of a release and waiver does restore competency. *Schuylkill Nav. Co. v. Harris*, 5 Watts & Serg. 28; 1 Cowen, 122. Corr's reasons for saying he had lost cotton showed that it was mere idle speculation on his part; his answer should have been ruled out. It was error to allow the witness to testify that defendant looked excited. *Johnson v. The State*, 17 Ala. 618. The testimony about others trading with defendants who brought in sacks before day, was clearly illegal and foreign to the issue. There was no proof that that cotton was stolen, and even if there was, there was no evidence to show knowledge of its having been stolen on part of defendants. *Wisdom v. The State*, 8 Port. 511; 5 Grattan, 596; *Rez v. Birdseye*, 18 Eng. Com. Law, 433. The additional charges, as the bill of exceptions terms them, were really "qualifications," and erroneous. *Edgar v. State*, 43 Ala. 45.

JOHN W. A. SANFORD, Attorney-General, with whom was F. M. WOOD, *contra*. — The refusal of the court to discharge two of the defendants, and its permitting a leading question to the prosecutor, are matters of discretion and not revisable. 35 Ala. 247. The testimony shows that Corr had lost other sacks besides the one mentioned in the indictment; that the parties who had them ran out of defendants' house, before day, when Avery appeared there. This testimony, and the testimony about what was done under suspicious circumstances, a short time before that, was admissible to show a guilty knowledge. 15 Ala. 749; 39 Ala. 247; 41 Ala. 405; 42 Ala. 532. The explanatory charges were not erroneous. 25 Ala. 57; 35 Ala. 184; 40 Ala. 715; 37 Ala. 117. Corr was not entitled to a judgment for value of the property on conviction. Rev. Code, § 3709. Besides, his waiver in open court makes him competent. The reasons given by the witness for saying he had lost cotton, goes to the weight and not to the admissibility of the testimony. The statement of the witness that prisoner "looked excited," was the statement of a fact. How can a witness describe a glance of surprise, or a menacing look, unless he uses the words which describe these emotions?

BRICKELL, C. J. — 1. On a conviction for receiving stolen goods, the party injured is not, as the counsel for appellants suppose, entitled to a judgment for the value of the goods, nor

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is any pecuniary penalty imposed for his benefit. He is not, therefore, disqualified as a witness. *State v. Trusts*, 9 Port. 126.

2. The witness Corr, having testified that he had lost two or three bales of cotton from his cotton-house in the fall and winter of 1874, was properly permitted to state his means of ascertaining the fact — that he knew it from the weight of the cotton after it was ginned, compared with its weight when it was put in the house.

3. It is in the discretion of the primary court to permit or refuse a leading question to be put by a party to his own witness, and the exercise of the discretion is not revisable on error. *Blevins v. Pope*, 7 Ala. 371; *Sayre v. Durwood*, 35 Ala. 247.

4. The conduct, demeanor, and words of one charged with crime, about the time of its commission or of its discovery, or on his arrest for or on accusation of it, are admissible in evidence against him. The mental emotion he exhibits is a criminative fact of more or less force, as it is connected with other facts and circumstances. Alarm, confusion, anger, resentment, or despair may be evinced, and may spring from a consciousness of guilt. In the olden time it was a popular superstition, that the corpse of the slain would bleed afresh if touched by the murderer; and it was deemed almost conclusive of guilt, that he who was charged with the murder refused to lay his finger on the body, or to take its hand. In recent years persons suspected of murder have been required to touch the dead body; not because the old superstition was indulged, but that its effect on them — the emotion produced and manifested — could be observed. *Burrill on Cir. Ev.* 478-9. The mental emotions, the manner in which they will be manifested, the causes which will produce them, are as varied and various as the faces and physical organizations of men. It is a dangerous species of evidence, and too much caution cannot be exercised in receiving and weighing it. It was proper to show that the defendant, who was in the storehouse when the cotton was found, exhibited alarm or confusion, or any other unusual emotion — any emotion which there was no adequate cause to produce, except a consciousness of guilt, and of his detection. We do not understand that any accusation of crime had been made against the defendant, or that there was anything in the mode of the witness' entrance into the storehouse calculated to provoke any excitement or agitation on the part of the defendant. That he exhibited it on the witness' entrance, and discovery of the cotton, was, therefore, a criminative fact. Whether it was manifested was a conclusion it was the exclusive province of the jury to draw when the signs of it were proved. The witness could not draw it for them. His opinion

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that the defendant "looked excited," should not have been permitted to go to the jury. Whatever signs of excitement he exhibited, the witness should have stated, and the jury should have been left free, without the aid of his opinion, to determine whether there was any undue excitement or agitation on the part of the defendant. *Johnson v. State*, 17 Ala. 618. The witness may not have been free from excitement himself, and his own emotions may, in his imagination, have lent a hue to the conduct of the defendant. Opinions of witnesses as to the conduct, or appearance, or demeanor of others are never very reliable, and should never be received when better evidence is attainable. It is never satisfactory, though it may be more difficult for them to state facts, and let impartial and sworn triers of fact form and express the opinion.

5. The evidence must be confined to the points in issue, alike in civil and in criminal cases, and facts and circumstances, which when proved are incapable of affording any fair, just, and reasonable presumption or inference, in reference to a material fact or inquiry involved in the issue, cannot be given in evidence. In criminal prosecutions, it is an elementary principle that evidence of a distinct, substantive offence is not to be received in support of another offence; nor, in the application of the rule, is it material that the offences are similar in character. The justness and reason of the rule is apparent, and a strict adherence to it is necessary to prevent criminal prosecutions from becoming instruments of oppression and injustice. No man shall be twice put in jeopardy for the same offence, and of the nature and cause of the accusation made against him, he shall be fully informed before he is called to trial, is the paramount law of the land. Than that accusation, he cannot be supposed to stand prepared to answer. This rule has, however, its exceptions; and while evidence of any other offence than that specially charged is *prima facie* inadmissible, such evidence will be received, when necessary to prove the *scienter* or guilty knowledge, which is an element of the offence charged. We must not be understood as asserting this is the only exception to the rule, but that it is the only exception this case involves. There are other exceptions, which, if necessary to classify, would be found perhaps to range themselves under these heads: when the offence charged and the offence proposed to be proved are so connected that they form part of one transaction; when it is material to show the intent with which the particular act charged as criminal was done, evidence of another similar act, though it was in itself a criminal offence, may be given; when it is necessary to prove a motive for the criminal act imputed, and there is an apparent relation or connection between that act and other criminal acts

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committed by the accused ; when it is necessary to prove the identity of the offender, or of an instrument used in committing the offence. There are also cases in which the accusation itself involves a series of acts which must be proved to make out the offence ; and cases in which the several offences are all parts of the *res gestæ*. This case is, however, limited to the exception of the *scienter*. The indictment against the defendants contains but one count, charging a single substantive offence, the buying, receiving, concealing, or aiding in concealing a sack of seed cotton, knowing the same had been stolen. The guilty knowledge is the material element of the offence. Evidence had been given tending to show that the sack of cotton had been stolen ; that it was carried into the storehouse of defendants in the night-time, and there found, connected with other evidence of suspicious circumstances. The State, against the objection of appellants, was permitted to prove, that during the week previous to the finding the sack of cotton in the storehouse of defendants, persons had been seen going into their storehouse just before and about daybreak, with sacks of cotton, and coming out with the sacks empty. These may have been suspicious facts or circumstances, from the time of their occurrence ; they may generate the belief the defendants were engaged in some species of illegal trading ; they may have tended to fix on them a bad reputation ; but it is not easy to perceive what legitimate tendency they had to prove the defendants knew this particular sack of cotton had been stolen. The evidence doubtless alarmed the suspicions of the jury, and inclined them the more readily to believe in the guilt of the defendants, and the less inclined to listen to whatever was offered or said in their defence ; but no legitimate inference of knowledge that this particular cotton had been stolen could be based on it. It was not shown the cotton carried there on other nights had been stolen ; and must the jury leap to the conclusion it had been, and having made that leap, take the further, that because that had been stolen the defendants must have known this cotton also was stolen ? Rumors and suspicions may be born of such facts, and depend on such inferences, but not the verdict of a jury which is to stamp dishonor and guilt on the citizen. This must rest on a more substantial basis. The law of the land has a higher logic and humanity than to found its judgments on such facts, and the vague inferences which unreasoning suspicion would draw from them. In the case of *Regina v. Oddy* (4 Eng. Law & Eq. 572), the evidence offered was much stronger than this. The defendant was indicted for receiving stolen goods, and it was proposed to prove the *scienter*, to show that at the time he received the prosecutor's goods he had in his possession other goods of the

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same kind, stolen from a different owner. Lord Campbell said: "The evidence does not tend to show that the prisoner knew these particular goods were stolen at the time he received them;" and the court quashed a conviction based on it. If a defendant is to be convicted only on an accusation of which he is fully informed; if he is not to be required to defend against any other accusation than that, the courts must protect him against evidence of this character, which cannot be made the basis of a just presumption or inference. If they had been apprised such evidence was to be introduced, who can say they could not have shown the transactions to which it relates were fair? What is the fair inference from the evidence — that the cotton carried into the storehouse at the times to which the witness referred was stolen? Why that inference? It is the most uncharitable which can be drawn; and must juries, despite the charity of the law, which does not permit crime or fraud to be presumed when the facts are consistent with innocence, be invited to indulge such an inference? We are of opinion the evidence was improperly admitted.

6. The Code declares that when two or more defendants are jointly indicted, the court may direct a verdict of acquittal to be entered in favor of any one of them, against whom there is not in the opinion of the court evidence sufficient to put him on his defence, and being acquitted he may be a witness. R. C. § 4192. This is perhaps nothing more than an affirmation of a rule prevailing at common law. Its introduction into the statute law of the State shows the importance the legislature attached to it. It imposes a delicate and responsible duty on the judge, to be exercised in furtherance of justice. It often occurs that grand jurors, through inadvertence, or on light and trivial evidence, join defendants who have no real connection in guilt, or some who are wholly innocent. Dishonest prosecutors may join them, to suppress evidence, or to silence all who could contradict them. While the judge trying the cause should be careful not to direct the acquittal of a defendant as to whom there is any evidence producing probable cause to believe him guilty; he should be as careful not to subject a defendant against whom there is no evidence amounting to probable cause to the hazards of a conviction, or his co-defendants to the deprivation of his evidence, by refusing to direct an acquittal. Much must be left to the discretion of the primary court, and its action in this respect should not be revised unless all the evidence is set out in the bill of exceptions. From the general statements of the bill of exceptions taken in this case, we are not prepared to say whether there was or not suf-

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ficient evidence to put on defence the defendants who moved for an acquittal.

7. In the qualifications, or rather the explanations, of the charges requested by appellants, we cannot perceive any error.

For the errors we have pointed out, the judgment must be reversed and the cause remanded. The defendants must remain in custody until discharged by due course of law.

Lee v. The State.

Indictment for Burglary.

1. *Appeal ; when will not lie.* — An appeal will not lie from an order of the circuit court overruling a motion of a defendant to discharge him from custody and quash a *capias* issued on indictment for an offence, to answer which he had been bound over by a magistrate and given bond before indictment found.

2. *Capias ; what irregular.* — Where a *capias* issues during the term, on indictment then found, it should not direct that defendant be committed to answer, &c., at the next term. The defendant is entitled to a disposition of his case during the term then being held, if possible.

APPEAL from Circuit Court of Cleburne.

Tried before Hon W. L. WHITLOCK.

The opinion states the case.

Neither the record nor docket gives the name of appellant's counsel.

The ATTORNEY GENERAL appeared for the State.

MANNING, J. — Appellant on the 6th of March last, being charged by one Groover with burglary, was arrested, brought before a justice of the peace, and bound over to appear at the next term of the circuit court, and from term to term thereafter, to answer to such indictment as should therefor be found against him, upon entering into a bail-bond, or undertaking with two sureties, in the sum of \$500.

At the next court, beginning April 26, an indictment was presented April 28, by the grand jury, for breaking into and entering the storehouse of Groover, a place where goods were kept for sale, with intent to steal ; whereupon a writ of arrest was on the same day issued upon order of the county solicitor, commanding the sheriff to arrest appellant and commit him to jail, to answer said indictment at the *next term* of the court to be held in September.

Being thus in custody, the prisoner — upon grounds not explained to this court — made a motion before the circuit court then in session, to quash the writ of arrest, or *capias*,

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and discharge him; which motion being denied, the prisoner took a bill of exceptions and appealed to this court.

The right of appeal is given by statute. The Revised Code (§ 4302) provides: "Any question in law arising in any of the proceedings in a criminal case, *tried* in the circuit or city court, may be reserved by the defendant but not by the State, for the consideration of the supreme court; and if the question does not distinctly appear on the record, it must be reserved by bill of exceptions . . . as in civil cases."

By section 4304 it is enacted: "Where such question is reserved in a case of felony, *judgment must be rendered* against the defendant; but the execution thereof must be suspended," &c.

From these sections it is clear that the appeal allowed can be taken in criminal cases as in civil (certain specified instances being excepted), only after final judgment. The appeal taken must, therefore, be dismissed, on motion of the attorney general.

We are at a loss, however, to understand by what authority, when an indictment was found two days after the opening of the circuit court, and it was in session, and the cause was (so far as this record shows) in no way disposed of, the solicitor should, on the day when the indictment was found, cause defendant to be incarcerated to answer to it at the next succeeding term of the court.

Defendant was entitled to a speedy trial, and should have been arraigned and permitted to plead; and then it might have been made to appear, what further ought to be done in the cause.

The motion defendant made was properly denied. He was entitled either to a trial, or to be enlarged on entering into a proper undertaking, with sureties, for his appearance to answer the charge. But this he did not ask. Appeal dismissed.

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Indictment for Murder.

1. *Charge to jury; what not erroneous as to law of self-defence.*—The court in charging upon the law of self-defence may properly instruct the jury that to justify the taking of life there must be an "*imperious necessity*" existing, or reasonably apparent, to prevent the commission of a felony or great bodily harm.

2. *Misleading charge; when ground for reversal.*—If a charge given has a tendency to mislead, the party objecting to it should ask an explanatory charge; failing to do this, his exception will not be available on error unless the inevitable effect of the charge was to mislead the jury.

3. *Section 2756 of Revised Code, construed.*—Section 2756 of the Revised Code secures to parties the unqualified right to have charges, moved for in writing.

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given in the very terms in which they are written, if embodying correct legal propositions and not abstract or misleading.

4. *Same.* — If the charge requested needs qualification, modification, or restriction, to render it a correct legal proposition, applicable to the evidence, it should be refused. If the court gives a charge, which it might have refused without error, it cannot afterwards add a qualification, however correct in point of law. Any other ruling nullifies the plain terms of the statute.

5. *Same; right to explain charge defined.* — The statute does not prohibit the explanation of a charge, in order to relieve it from involvement or obscurity, or to make plain and interpret the terms employed, if necessary to prevent its misleading the jury, or to enable them intelligently to apply to the case before them the principles of law asserted in the charge.

6. *Homicide; duty of retreat.* — Our common law of homicide is derived from that of England, and wherever that law requires the person assaulted to decline the combat, or retreat before he will be excused in taking the life of his adversary, our law requires the same.

7. *Peril of mere battery; will not justify taking of life.* — Peril of a mere indignity to the person or of a battery, from which great bodily harm cannot reasonably be apprehended, will not justify the taking of life, although such peril could not be escaped by retreat, or the danger to it would thereby be increased.

8. *Malice; presumption of, from weapon used.* — A deliberate killing with a deadly weapon is presumed to be malicious; but if the facts and circumstances are in evidence, the presumption must be drawn from the whole evidence and not from the nature of the weapon only. This presumption it is for the jury to draw, and no one fact should be singled out and disconnected from the other evidence, and malice or any other necessary fact inferred from it.

9. *Bad character of deceased; when admissible evidence.* — Evidence of the bad character of the deceased for violence, &c., is admissible when it illustrates or tends to illustrate the circumstances attending the homicide, and to qualify, explain, and give meaning and point to the threats and conduct of the deceased at the time of the killing.

10. *Same.* — Such proof is not limited to cases in which the degree of homicide, or the fact that the killing was in self-defence, is doubtful; but it should never be received when there is no act or word of deceased, at the time of the killing, which can be explained or illustrated by such character, or when there is no evidence tending to show that the killing was in self-defence.

11. *Same; province of jury as to.* — It is for the jury to say, in view of the character of the deceased, what his threats and conduct at the time of the homicide really imported, and how far they illustrate the condition of the parties and the motives which actuated them. A charge singling out a particular act or isolated expression of the deceased, and instructing the jury that that act or threat cannot be invoked to illustrate this bad character, is an invasion of their province and necessarily erroneous.

12. *Charge; what misleading and properly refused.* — A charge which would authorize the jury to acquit, if the homicide was committed under the apprehension of danger, whether to life or limb, or of lesser injury, without regard to the reasonableness of the apprehension, is properly refused.

13. *Confession; weight to be accorded to.* — There is no rule of law requiring the jury to give equal credence to every part of a confession "unless it is clearly disproved." All of it must be carefully weighed in the light of the surrounding circumstances, the motives which may have induced it, and its consistency with the other evidence, and the jury, without capriciously accepting or rejecting any portion, should credit such parts as they find reason for believing, and reject that part which they find reason for disbelieving.

14. *Homicide, justification for; what cannot be set up.* — The slayer cannot urge in justification of the killing a necessity produced by his own wrongful or unlawful act.

APPEAL from Circuit Court of Russell.

Tried before Hon. J. E. COBB.

The appellant, A. B. Eiland, was indicted for the murder of J. L. Davis. He was convicted of murder in the second de-

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gree and sentenced to twenty years' imprisonment in the penitentiary.

Many witnesses were introduced on both sides, and the testimony was, in some respects, conflicting. However, it clearly establishes that the deceased and the prisoner had never been unfriendly, and continued on friendly terms up to the time of the fatal rencounter. The prisoner's general reputation "as a peaceable, quiet, law abiding man" was proved by a number of witnesses, while, on the other hand, the deceased was shown to be a quarrelsome, turbulent, reckless, and dangerous man when under the influence of liquor. It was also shown that the deceased was a very powerful and muscular man. Some of the witnesses testified, however, that the prisoner was the heavier of the two.

On the evening of the killing, Davis, the deceased, came to Eiland's store and asked for whiskey. Eiland had none, but procured a bottle of it from a neighboring store and handed it to Davis, when they both drank together. Davis then asked for a plug of tobacco which was handed him, Eiland remarking that there was something due on last year's account. Davis inquired how much, and Eiland, after referring to his books, answered two dollars and a half. Davis then said he had not yet sold any of his cotton, "but would do so next week and pay every debt he owed in the town;" at the same time throwing the tobacco down and starting towards the side door. Eiland asked "if he was going to pay," to which he replied "No. I can whip any man who throws two dollars and a half in my face." Eiland replied with an oath, and inquired of Davis "what he was running for?" Davis then went around to the front door, having picked up a piece of plank as he went. One witness testified that as Davis went to leave, Eiland asked him, in a very quiet manner, if he was not going to pay, and Davis still continuing to move towards the side door, Eiland remarked to him: "Come back and pay me. You d——d coward, what are you running for?" Davis answered back: "Come out here and I'll settle with you," or "D——n you I'll settle with you out here." Eiland replied: "No; I won't come out there." There was some conflict in the testimony as to what Davis did after coming around to the front of the store. Some of the witnesses testified that he remained about there "some little time," cursing Eiland, who was then standing on the portico of his store, the parties not being thirty yards apart at any time.

It is not clear from the testimony who commenced the fight, or whether at that time Davis had the plank. There was testimony on the part of the State that Davis threw down the plank before the difficulty commenced, saying to Eiland that

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he, Davis, was unarmed and would not go into Eiland's store, but that if Eiland came out he would whip him. About this time the parties engaged in a struggle, and rolled over on the ground. Davis cried out that he was cut, at the same time saying, "Bunk, what do you mean? Do you mean to kill me?" Eiland replied, "Yes, d——n you, I intend to kill you." On examining Davis it was found that he had received several cuts, one of which proved fatal a few minutes afterwards. The cutting was done with a spring-back knife, the blade of which was four or five inches long. It had been kept by Eiland in his store to open sardine boxes and for other like purposes, and was picked up by him as he came out.

The State introduced two witnesses who testified that they went to Eiland's house on the night of the difficulty. As they went in Eiland said: "Here I am, arrest me if you like." Prisoner also told them that "Davis was rearing around wanting a fuss, and ran up and caught hold of me and jerked me off my steps. I knocked him down with my fist. Davis rose and came at me again. I knew I was unable to cope with him, and I cut him five or six times, and tried my damndest to kill him."

The foregoing is all of the testimony of the numerous witnesses examined, which is necessary to a proper understanding of the case.

The court gave a general charge to the jury upon the whole law of the case. In it was embodied this paragraph: "To justify the taking of life there must be an imperious necessity existing to prevent the commission of a felony, or great bodily harm, or such appearance of necessity as would impress the mind of a reasonable, prudent man that it actually existed. And if you believe from the evidence, beyond a reasonable doubt, that the defendant Eiland took the life of Davis, the deceased, without the existence, or apparent existence, at the time of the killing, of this imperious necessity, he is not guiltless. This necessity cannot be said to have existed if the defendant could have avoided the combat without danger to his life or limb; or if the defendant voluntarily brought on the combat. A man cannot create a necessity and then claim the benefit of it."

The bill of exceptions recites that "to the charge of the court, given *mero motu*, the defendant excepted, and especially to so much of it as instructs the jury that 'the necessity which would authorize a man to take the life of his assailant must be imperious.'"

The defendant requested ten written charges, seven of which the court gave in the terms in which they were asked. The eighth charge requested, as copied in the transcript, is as fol-

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lows: "That though the jury may infer malice from the use of a deadly weapon, yet they are not bound to infer malice from the use of any particular weapon; but that the use of a deadly weapon is a circumstance that they may look to, in connection with all the circumstances, in determining the existence or non-existence of malice." The court refused to give this charge, and the defendant duly excepted. The ninth charge requested by defendant was as follows: "If the confessions of the defendant introduced by the State showed that the defendant acted under apprehension of danger, then the jury must acquit the defendant unless the truth of such confessions is clearly disproved." To the refusal to give this charge the defendant duly excepted. The tenth charge requested by the defendant was as follows: "In this State a person is not bound to retreat from his assailant when attacked, if by so retreating he increases the threatened danger to his person or his own life; that the law, when it requires an assailed person to decline the combat, means that he must do so unless so retreating will endanger his own person or life;" which charge the court gave, "with the following qualification *mero motu*, 'but the necessity that would authorize a man to slay his assailant must be, or appear to the slayer to be, an imperious necessity,' to which qualification of said charge by the court the prisoner excepted."

The court, at the request of the solicitor, gave the following charges in writing, to the giving of each of which the defendant duly excepted: 1. "If the necessity for the killing is produced by defendant's attacking the dead man, then such necessity does not justify or excuse the killing." 2. "If the defendant kills another, and could avoid that killing, without danger to himself, by retreating, then he is not excused or justified, but is guilty." 3. "If there are no acts or demonstrations or threats at the time of the killing, then no matter if his character is violent or turbulent, the killing is not justified or excused; and a mere threat of deceased, 'Come to me and I will whip you,' is not such a threat as can invoke a violent or turbulent character for its illustration."

The various charges to which exception was reserved are now urged as errors fatal to the judgment and conviction.

WILLIAM H. BARNES for appellant. — 1. The eighth charge requested should have been given. It merely asserted the law to be that the jury was to draw the inference of malice, and that it did not necessarily follow, because a deadly weapon was used, that the killing was malicious, when there was other evidence in the case. 45 Ala. 82; 47 Ala. 570; 15 Ala. 749; *Ogletree v. The State*, 28 Ala. The qualification of the charge

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given was erroneous. *Edgar v. The State*, 43 Ala. 52. All the charges given at the request of the solicitor should have been refused; they were calculated to confuse and mislead the jury. The last charge given, at the request of the solicitor, was particularly objectionable. Its effect was to prevent consideration of the bad character of the deceased, and effectually withdrew that question from the jury.

JOHN W. A. SANFORD, Attorney General, *contra*. — The eighth charge asked was properly refused. 37 Ala. 142; *Hill v. State*, 43 Ala. 338; Starkie's Evidence (Sharswood's edition), 698. The charge is involved. It required the jury to find additional circumstances to the use of the knife before they could draw the inference of malice. The confessions may be true in part, or false in part. There is no law requiring equal credence to every part; and a jury may disbelieve any part, although uncontradicted by direct testimony, if it seems incredible. 48 Ala. 266; 31 Ala. 329. There was no error in the qualification of the charge. *Turbeville v. The State*, 40 Ala. 715. The third charge given at the request of the solicitor, even if erroneous, was not prejudicial to defendant; there was no evidence under which the jury could lawfully give any weight to the bad character of deceased.

BRICKELL, C. J. — A general charge was given the jury, lucid and accurate in its definition of the various degrees of criminal homicide, of the facts which must concur to constitute the one or the other, and the strength of evidence which would authorize a conviction. In this charge is embodied this paragraph: "To justify the taking of life there must be an imperious necessity existing to prevent the commission of a felony, or great bodily harm, or such appearance of necessity as would impress the mind of a reasonable, prudent man that it actually existed. And if you believe from the evidence, beyond reasonable doubt, that the defendant Eiland took the life of Davis, the deceased, without the existence, or apparent existence, at the time of the killing, of this imperious necessity, he is not guiltless. This necessity cannot be said to have existed if the defendant could have avoided the combat without danger to his life or limb; or if the defendant voluntarily brought on the combat. A man cannot create a necessity and then claim the benefit of it." An exception was reserved to so much of this charge as asserts, "that the necessity which would authorize a man to take the life of his assailant must be imperious." Among other charges requested by the defendant was the following: "That in this State a person is not bound to retreat from his assailant when attacked, if by so

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retreating he increases the threatened danger to his person or his own life; that the law, when it requires an assailed person to decline the combat, means that he must do so unless so retreating will endanger his own person or life." This charge the court gave, but with the qualification, that "the necessity which authorizes a man to slay his assailant must be, or appear to the slayer to be, an imperious necessity." To this qualification an exception was reserved. At the request of the solicitor, the court gave the following instructions: "That if the necessity of killing is produced by the defendant attacking the dead man, then such necessity does not justify or excuse the killing. If the defendant kills another, and could avoid that killing, without danger to himself, by retreating, then he is not excused or justified but, is guilty." An exception was reserved to these instructions.

Confining our inquiries as to the general charge of the court to the matter of the exception, we cannot declare it erroneous. Necessity only, real or appearing to be real, can justify the taking of human life. In the leading case of *Oliver v. State* (17 Ala. 587), it is said, the law will justify the taking of life when it is done from necessity, to prevent the commission of a felony, or to preserve one's own life or his person from great bodily harm." Again: "To justify the taking of life there must be an *imperious* necessity to prevent the commission of a felony, or great bodily harm. Without this necessity, the law, although under some circumstances it will mitigate the crime to manslaughter, cannot hold the party slaying altogether justified." Subsequent decisions, varying but little in language, affirm the same principle. *Holmes v. State*, 24 Ala. 67; *Noles v. State*, 26 Ala. 31; *Hughey v. State*, 47 Ala. 97. If it was apprehended that the charge, under the particular facts of the case, had a tendency to mislead the jury, to impress them with the conviction that there must be something more than an apparent pressing necessity, that the defendant should take the life of the deceased to save himself from great bodily harm, an explanatory charge should have been requested. It is not the practice of this court to reverse, in civil or criminal cases, because a charge given by the court has a tendency to mislead. Such must be its inevitable effect, or the party complaining to procure a reversal must have asked a charge obviating the misleading tendency. 1 Brick. Dig. 344, § 129.

It is insisted the court erred in the qualification attached to the charge given, at the request of the defendant. In the view we have expressed, the qualification is not erroneous in point of law; but that being conceded, the power of the court to add any qualification to a charge in writing, given on request of either party, is denied; and in support of the propo-

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sition, we are referred to *Edgar v. State*, 43 Ala. 45. The statute is: "Charges moved for by either party must be in writing, and must be given or refused in the terms in which they are written; and it is the duty of the judge to write 'given,' or 'refused,' as the case may be, on the document, and sign his name thereto, which thereby becomes a part of the record, and may be taken by the jury with them on their retirement." R. C. § 2756. Prior to the Code, for many years, it was the course of decision in this court that a party was entitled to a charge requested, in the language in which it was expressed, if it asserted a correct legal proposition applicable to the facts of the case; and if refused, the error of refusal was not cured because a charge had already been, or was subsequently given of equivalent import. *Rives v. McLoskey*, 5 Stew. & Port. 330; *Maynard v. Johnson*, 4 Ala. 116; *Ivey v. Phifer*, 11 Ala. 535; *Clealand v. Walker*, Ib. 1059; *Hinton v. Nelms*, 13 Ala. 222; *Cole v. Spann*, Ib. 537; *Philips v. Beene*, 16 Ala. 720. It was not supposed while this was the rule of practice that the court was deprived of the power, or relieved from the duty of giving other and further explanatory charges, if proper, to prevent the jury from being misled, or to enable them intelligently to apply the law to the evidence. In *Long v. Rodgers* (19 Ala. 321) the rule of practice was changed, and the decisions to which we have referred were overruled, a majority of the court holding (CHILTON, J., dissenting), that a judgment would not be reversed because of the refusal of a charge in the language in which it was requested, the charge given being a full and fair exposition of the law. Such remained the law of this court until the adoption of the Code of 1852, containing the statutory provision to which we have referred. *Ewing v. Sanford*, 21 Ala. 157. Soon after the adoption of the Code, the construction of this section was presented to this court. Charges were given as requested, but the court added an explanation supposed to be necessary to prevent them from misleading the jury. CHILTON, C. J., speaking for the court, said the statute was complied with; that it "was not designed to deprive the court of the right to give explanatory charges after giving the charge as prayed for. Indeed, it is the duty of the court to see to it that the jury are not misled by any charge which is given, but so to simplify and explain the charges which are given, by additional instructions, as to prevent misunderstanding or a misapplication of them." *Morris v. State*, 25 Ala. 57. In *Dupree v. State* (33 Ala. 380), it was held that it was not error for the court to qualify a charge requested, which without qualification might have misled the jury. In *Bell's Adm'r v. Troy* (35 Ala. 185), it was said: "If a charge requested is free from involvement or ten-

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dency to mislead, and asserts a correct legal proposition, it is the duty of the court to give it as asked; and if the presiding judge is apprehensive that it places any particular phase of the case in undue prominence before the jury, it is his privilege, if not his duty, to give an additional explanatory charge." In *Scott v. State* (37 Ala. 117), the court having charged the jury orally, at the request of the defendant gave several charges in writing, and added, "that the jury would receive the written charge, in connection with the charges and law as given and expounded orally from the bench, as the law of the case," and the addition was held proper. In *Turbeville v. State* (40 Ala. 715), the court, at the request of the defendant, charged the jury, "that they must find the defendant not guilty, unless the evidence against him is such as to exclude to a moral certainty every supposition but that of his guilt," but added, the charge only meant that the jury must be satisfied, beyond a reasonable doubt, of the guilt of the defendant. The addition was held an *explanation*, not a *qualification* of the charge, and correct. In *Edgar v. State, supra*, the charges given asserted incorrect legal propositions, and, as the chief justice declared, should have been refused altogether; but having been given as requested, the power of the court to add to them any qualification was denied, and because of the qualifications the judgment was reversed. We regard the statute as introductive and affirmatory of the original rule of practice, which was announced and observed in this court, and intended to secure to the parties the unqualified right to charges requested when they affirm correct legal propositions, not abstract, and not misleading, in the terms in which they are expressed. The right is valuable, for whatever may be the learning and ability of the presiding judge of the court, counsel who have patiently and diligently examined the facts and law of a case are often better prepared to frame an instruction that will clearly express and directly impress the jury with a distinct and definite idea of the legal proposition on which reliance for a favorable verdict is placed. However this may be, it is but just to afford them the opportunity of presenting such propositions, in the terms which they believe most apt to give them effect. This right the statute secures, and it cannot be diminished by the giving of a charge as it is requested, and then so limiting, restricting, or modifying it by qualification, as to diminish the force to which it may be entitled as a legal proposition. If the court had such power, it would be idle to say the charge was given in the terms in which it was written. The right and duty of the court is not to qualify, or limit, or modify, or restrict the charge. If it needs qualification, or restriction, or modification, to make it a correct legal proposition, as applicable to the evidence, the duty

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of the court is to refuse it. The power and duty of the court is to *explain*, not to *qualify*, and is very clearly expressed in the case of *Bell's Adm'r v. Troy, supra*, and in *Morris v. State, supra*. The terms *qualification* and *explanation*, as applied to charges requested and charges given, are sometimes used in our decisions as of equivalent meaning, and because of this loose use of words there seems to be a conflict of decision. The conflict is however seeming, not real. We are not aware of any case, since the statute, which has sanctioned the power of the court to qualify a charge given on request, nor of any which denies the power to explain, when the charge, though asserting a correct proposition, is inapt, or involved in expression, or has a tendency to mislead, unless explained. The correctness of the charge requested by the appellant was conceded by the court when it was given. The qualification which was added correctly states the law, and had been in the same terms affirmed in the general charge. It is not in explanation of the charge requested. It does not interpret or make more intelligible any expression employed in the charge given, nor does it relieve that charge from any obscurity or involvement attributable to it. The charge requested, and given, refers to the duty of him who is assailed to retreat, rather than to repel the assault by violence endangering the life of his assailant. The qualification refers to the character of the necessity, justifying the taking of human life. However correct it may be, as a legal proposition, without invading the right secured by the statute, it could not be added to the charge given. It is a modification or limitation of that charge; and when it is remembered the impression which every word falling from the judge makes on the minds of the jury, it would be hazardous to say no injury resulted from the change. The charge goes to the jury not explained, but modified and restricted in its application, so that it would bear to their minds the impress of illegality in some respects.

The charge could have been properly refused. It has an immediate tendency to mislead the jury; and if given without explanation, would probably have induced them to believe that any peril to the person, though it was of a mere indignity, or of a mere battery, from which great bodily harm could not have been reasonably apprehended, would justify the taking of life, if it could not be escaped by retreat, or if retreat would increase the peril of it. Life cannot be taken to avert any other than a felonious assault, or an attempt to commit a forcible felony. If an assault is not felonious, however it may mitigate, it cannot justify a homicide. If a felonious assault is so violent that the assailed cannot retreat from it without manifest danger to his life, or of enormous bodily harm, the duty of retreat does not

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rest on him. Or if, under the particular facts of a case, the peril of life, or of great bodily harm, would be increased rather than lessened by retreat, he may stand and resist his assailant to his death. While we hold the charge could have been properly refused, and that the court could properly have explained it, we are constrained in obedience to the statute, and the authorities to which we have referred, to hold its qualification without the power of the court, and erroneous.

The first charge given on request of the solicitor seems to us to assert only the recognized general principle that a person who has slain another cannot urge, in justification of the killing, a necessity produced by his own unlawful or wrongful act. Cases on Self Def. 220.

The second charge given on request of the solicitor, when applied to the evidence, we hold, asserts a correct proposition. In *Pierson v. State* (12 Ala. 149), it is held, and as we think correctly, that the common law of this State on the subject of homicide is derived from, and the same as the common law of England; and when that law requires the person assailed to decline the combat, or to retreat before he will be excused in taking the life of his adversary, our law requires the same. There may be cases of murderous assault, or of assaults with intent to commit other atrocious felonies, from which it is not the duty of him who is assailed to retreat. When, however, the assault is made on sudden quarrel, and a mutual combat ensues, retreat, if possible to avoid the threatened danger, is a duty. For as is said in *Commonwealth v. Drum* (58 Penn. 1), "when it comes to a question whether one man shall flee or another shall live, the law decides that the former shall flee rather than that the latter shall die."

The eighth charge requested by the defendant is rather involved and confused. On the argument we were inclined to the opinion its refusal was erroneous. A more careful examination leaves us in doubt as to its true meaning. The law is that when life is taken with a deadly weapon malice is presumed, for the inference is that the natural or probable effect of any act deliberately done is intended by its actor. Whart. Am. Crim. Law, § 944. It is the peculiar province of the jury, however, to draw the presumptions or inferences from the facts in evidence. When the circumstances attending the killing are shown, no one fact should be singled out and disconnected from the other evidence, and malice, or any other necessary fact inferred or presumed from it. Whether from all the facts malice is fairly to be presumed, the jury should determine. In *Murphy v. State* (37 Ala. 142), the circuit court had instructed the jury that when a killing has been proved, the law presumes malice, unless the evidence which proves the killing repels the

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presumption. The charge was held free from error, when construed in reference to the fact that the killing was perpetrated with a deadly weapon. In *Hampton v. State* (45 Ala. 82), the court charged the jury, if they believed the killing was done with a gun they must infer malice. The charge was held erroneous as an invasion of the province of the jury, and because it placed the guilt or innocence of the defendant upon the character of the instrument used, wholly excluding the consideration of the other facts in evidence tending to show the homicide was excusable. A similar charge on the same reasoning was declared erroneous in *Martin v. State*, 47 Ala. 564. We were inclined to regard this charge as asserting simply that a deliberate killing, with a deadly weapon, is presumed to be malicious; but if the facts and circumstances attending the killing are in evidence, the presumption must be drawn from the whole evidence, and not from the nature of the weapon only. If this is the proposition intended to be expressed, the charge was correct. But as for the error we have already pointed out a reversal follows, we pass over this charge, remarking only that care should be taken to frame with distinctness and clearness instructions to be given the jury.

On the trial evidence was given tending to show the bad character of the deceased for turbulence, violence, and revengefulness. In view of this evidence, the court, at the request of the solicitor, charged the jury: "If there are no acts or demonstrations, or threats at the time of the killing, then no matter if his character is violent or turbulent, the killing is not justified or excused; and a mere threat of the deceased, 'Come to me, and I will whip you,' is not such a threat as can invoke a violent or turbulent character for its illustration." The principle to be deduced from our decisions is, that the bad character of the deceased, of itself, cannot lessen the criminality of his killing. As a mere abstract proposition, or isolated fact, it should have no influence in determining the guilt of the accused. Whatever may be his character for violence, turbulence, recklessness, and vindictiveness, the man is under the protection of the law, and it is as great a crime to take his life as it is the life of the most quiet, orderly, and law-abiding citizen. But evidence of his bad character for turbulence, violence, recklessness, desperation, and revengefulness should be received when it *illustrates*, or tends to *illustrate* the circumstances attending the homicide; when it qualifies, explains, and gives meaning and point to the threats or conduct of the deceased at the time of the killing. The rule must not be understood to excuse the taking of life because the character of the man is bad. Nor, on the other hand, must it be limited to cases in which the degree of homicide is doubtful; or in

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which it is doubtful whether the killing was in self-defence, or under circumstances which acquit the slayer of guilt. A reasonable doubt as to the degree of the criminality of the homicide would require that the accused should be found guilty of the least degree the evidence would establish. Therefore, when provocation has been given, it may be permissible to look to the character of the deceased in determining its character. Or, if there is a doubt whether the homicide is attended with circumstances excusing or justifying it, an acquittal is demanded by law. Limiting the evidence, therefore, to cases in which there is doubt is a practical denial to it of all influence. *Feliz v. State*, 18 Ala. 720. The conduct of the deceased at the time of the killing may have been apparently innocent, or the threats then made by him apparently harmless; yet, when illustrated by his character, may have excited in the mind of the accused a reasonable belief of his imminent peril, and may satisfy the jury that they imported such peril, and justified the accused in the force he used to avoid the peril. *Quesenberry v. State*, 3 Stew. & Port. 308; *Pritchett v. State*, 22 Ala. 39; *Franklin v. State*, 29 Ala. 14. On the court, in every case, rests the responsibility of determining the admissibility of the evidence of the character of the deceased. It should never be received, when at the time of the killing there is no act or word of the deceased which can be illustrated or explained by it; or when there is not evidence conducing to show the killing was in self-defence. When admitted, its weight and effect belongs to the jury under proper instructions from the court. The first branch of the charge we are considering may be a correct statement of the law. The latter branch seems to us manifestly incorrect. The evidence is received to illustrate, to explain, to give force to the words or conduct of the deceased at the time of the killing — to enable the jury to arrive at the true condition of the parties then, and the motives which it may reasonably be supposed influenced them. The conduct may have been apparently innocent, or the threats harmless; or the threats may have been of slight injury, or even conditional, in their ordinary significance; yet, it is for the jury to say in the light of his character what these threats or this conduct really imported, or what impression they could reasonably have made on the mind of the accused. When the court singles out a particular act of the deceased, really or seemingly innocent, or a particular threat or expression, and declares to the jury such act or threat cannot be illustrated by this bad character, the province of the jury is invaded. In giving this charge the court erred.

Confessions and declarations made by the defendant in reference to the killing, and its attendant circumstances, were

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introduced in evidence by the State. The defendant requested the court to charge the jury, "that if the confessions, of the defendant introduced by the State show that the defendant acted under apprehension of danger, they must acquit, unless the truth of such confessions is clearly disproved." This charge was refused, and properly. The danger apprehended may not have been of that character to avert which the law excuses the taking of life. Any danger whether of life or limb, or of a lesser injury, may have been apprehended, and would, if the charge had been given, have authorized an acquittal. The apprehension may not have been reasonable — it may have been the result of an unreasoning fear, or passion, and yet would have excused the defendant, under the charge. But if the charge was not objectionable in these respects, if it had clearly expressed, and distinctly defined the danger, and the kind of apprehension which would have required an acquittal, it could not be sanctioned. Confessions or declarations, whether offered in evidence in a civil or criminal case, must be received as a whole. The part which criminales must be taken connected with that which exculpates. The law does not ascertain the credence which shall be attached to either part, or to the confession or declaration in its entirety. The jury are not bound to attach equal credence to every part; they may, for sufficient reasons, reject a part and give effect to a part; such rejection cannot be capriciously made, nor can credence be capriciously given to a part. That which is favorable to the party should not be rejected merely because it is favorable to him, and because of the motives which may have induced him to make it. The confession should be taken as a whole; the time and circumstances of its making, — its harmony or inconsistency with other evidence, and the motives which may have operated on the party in making it, — should all be fairly considered by the jury. Then, without regard to whether they are clearly disproved or not, the jury should credit all which they find sufficient reason for crediting, and reject all which they find sufficient reason for rejecting. In *Corbett v. State* (31 Ala. 329), the true principle is stated. Declarations of the prisoner had been introduced by the State, and he requested the court to charge the jury, that they must be taken together as a whole, "and, if there was no other evidence in the case incompatible with it, the declaration so adduced in evidence must be taken as true." This court said: "We do not deny the doctrine, that when a confession is given in evidence against a defendant, it is his right to have the whole conversation laid before the jury, and considered by them. It does not follow, however, that if there be either no other evidence in the case, or no other evidence incompatible

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with it, the declaration so adduced in evidence must be taken as true. The declaration or confession may be incompatible with itself, or may be so unreasonable as to tax credulity too far. We hold that the defendant has all his rights, in this connection, when the entire conversation is laid before the jury, and they are instructed to give a fair and unprejudicial consideration. Of course that body will not, and should not without reason, believe that portion which makes against the prisoner, and reject all which favors his innocence."

For the errors we have noticed, the judgment must be reversed, and the cause remanded. The prisoner will remain in custody until discharged by due course of law.

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Indictment for Retailing without License, under Section 3618 of Rev. Code.

1. *Retailing without license under section 3618 of Rev. Code; what constitutes.* — A restaurant keeper, regularly licensed as such by the city of Montgomery, having a wholesale, but no retail, license from the State, who sells vinous liquors only to persons taking meals at his restaurant, the liquors being drunk by them only while eating, is guilty of an indictable offence under section 3618 of the Revised Code.

2. *Same; sufficiency of indictment for.* — *Mulvey v. The State* (43 Ala. 348), and *Campbell v. The State* (46 Ala. 116), reaffirmed as to the sufficiency of the form of indictment under section 3618 of the Revised Code.

APPEAL from City Court of Montgomery.

Tried before Hon. JOHN A. MINNIS.

The defendants were indicted for selling "vinous or spirituous liquors without license and contrary to law," against the peace &c., following the form prescribed by the Revised Code. They waived a jury trial and submitted the case, on an agreed state of facts, for decision by the court, which found them guilty and imposed a fine. To this ruling the defendants excepted and now assign it for error.

The agreed state of facts show that defendants were restaurant keepers in the city of Montgomery, duly licensed as such by the city, and having a wholesale, but no retail, liquor license from the State; "that in their capacity as restaurant keepers they sell wine and ale, by the bottle, to any person who comes into the restaurant and asks for breakfast, dinner, or supper, and that defendants always furnished such ale or wine, when asked for, while the customer was at table eating, to be *drank only while eating or enjoying the meal*; that it has been the custom in the city of Montgomery, for more than ten years past, to sell wine or ale, by the bottle, to customers while in the restaurant and engaged at meals; that the cost of the wine or ale

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furnished is charged and paid for as part of the meal ; that defendants' main business is that of confectioners, and their business of restaurant keepers merely incidental to it."

HERBERT & MURPHY for appellant. — The real object of § 3618 of the Code is to regulate tippling shops, and prevent their being disorderly. We have no statute prohibiting retailing generally. This is a common law right. Bishop Statutory Crimes, § 984. The act for which retailers are required to take out license is the *business* of retailing liquor, when it is the *main business* and not an incident. See *Carter v. The State*, 44 Ala. The State gave the city of Montgomery a right to regulate "restaurant" keepers by licensing them, but it passed no state law operating on them as such. The business being lawful, without a license, at common law, and the furnishing of wines at meals being a part, and necessary element, of the meal, how by any fair construction can the act of defendants be brought within the spirit of § 3618 of the Code? When the legislature gave the city of Montgomery authority to license "restaurant" keepers, and did not itself put any requirement on them, it conferred a right on defendants, when licensed by the city, to carry on the usual business of *restaurants*, which was well known to be the furnishing of food and drink to transient people. The indictment is insufficient. *Harris v. The State*, January term, 1874.

JOHN W. A. SANFORD Attorney General, *contra*.

MANNING, J. — Section 3618 of the Revised Code makes it an indictable offence for any "person who, not having first procured a license as a retailer from the proper legal authority, sells vinous or spirituous liquors of any kind . . . in any quantity, if the same is drunk on or about his premises."

The agreed state of facts in this cause shows that defendants did sell vinous liquors to be drunk and which were drunk on their premises ; but they were so drunk only by persons taking meals at the time at the restaurant in Montgomery which defendants were licensed to keep. And it is ingeniously and elaborately argued that this was not a violation of said § 3618.

We are asked to make an exception in the statute law, which the legislature did not make when it was framed and adopted. If we established such an exception, it would be equivalent to making an addition to the statute, of this effect: provided, it shall be no offence for a licensed restaurant keeper to sell such liquors to his customers to be drunk while they are taking meals on his premises.

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Suppose an amendment, such as this suggested proviso, had been offered while the enactment was pending in the legislature; have we any warrant for saying it would have been adopted? May not the general assembly have thought that the making of such an exception would lead to the establishment of a great many restaurants, in which the liquors would be the chief article purchased and partaken, and the solid food a mere incident or pretence; and which, nevertheless, it would be very difficult, if not impossible, to abate? See *Pierce & Baldwin v. Pass & Co.* 1 Port. 232. It was very easy, if the legislature was willing such an exception should be made to the law, for it to make it. For us by construction to make it would, we think, be an exercise of a power denied to the judicial department, — and an invasion of the province belonging to the general assembly alone.

The indictment is in the form prescribed by the Code, and has been held to be sufficient under § 3618 of the Revised Code. *Mulvey v. The State*, 43 Ala. 318; *Campbell v. The State*, 46 Ala. 116.

We think there is no error in the matters brought to our attention. And the judgment of the court below is affirmed.

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Indictment for Bigamy.

Bigamy; what charge as to erroneous. — Held, that upon the facts of this case, as detailed in the opinion, a charge that “marriage in cases of this kind could be proved by cohabitation, living together, or the confession of the parties; that it was like any other civil contract in this respect; and it was not necessary to show by proof, that the requirement of the statutes were conformed to in order to establish a marriage in either case, and that it was not necessary to show the authority of the parties who solemnized the marriages,” &c., was erroneous.

APPEAL from Circuit Court of Tuscaloosa.

Tried before Hon. W. B. WOOD.

The facts of the case are fully stated in the opinion.

VAN HOOSE & POWELL, for appellant. — The rule requires stricter proof in prosecutions for bigamy, than where marriage is sought to be established to obtain dower. 15 Mass. 163; 4 Johns. 52–3. *Campbell v. Gullat* (43 Ala. 57) goes not further than to decide what proof of marriage is sufficient in a dower case. In bigamy, the highest and best evidence of the marriage must be shown. 2 Kent, § 87; Bishop on Marriage & Divorce, § 324. The charge given would authorize a conviction

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on mere cohabitation. The facts of this case do not show that bigamy has been committed.

JOHN W. A. SANFORD, Attorney General, *contra*. — The charge of the court was free from error. It was unnecessary to prove the issue of a license. *Campbell v. Gullat*, 43 Ala. 57; *Murphy v. State*, 6 Ala. 265. The first marriage was sufficiently proved. *Langtry v. The State*, 30 Ala. 356.

MANNING, J. — The indictment in this cause, in the form prescribed by the Code, charges that defendant, "having a husband then living, unlawfully married one Joe Tunstall," &c. It is therefore a valid indictment. It does not, though, inform defendant who the supposed first husband was, or when or where it is supposed she was married to him; which leaves her at very great disadvantage on her trial. The State ought, therefore, in a prosecution so highly penal, for an offence made a felony by the statute, to be put to very clear and convincing proof of a valid first marriage, and of the subsequent facts requisite to constitute the crime of bigamy.

The only evidence in this cause is that of one Sally Peoples, a negro woman, that she was present "about two years after the surrender" (in what place or county not mentioned), when defendant was married to one Noah Wilson; that they "lived together some time as husband and wife, and afterwards separated; that they had been separated four years, going on five, and that the marriage ceremony was performed by one Asa Sanders, a colored man who followed preaching, and read the 'testimony' to the parties." No license was proved, or other evidence in regard to this alleged first marriage was produced.

A similar ceremony was proved by same witness as having been performed "last Christmas was a year ago" (A. D. 1873) between defendant and one Joe Tunstall (without mention of any place or county), "by one Norval Coleman, a colored man, who read the *testimony* to them."

The bill of exceptions, of which we have given the entire substance, sets out that this was "all the testimony in the cause, and Sallie Peoples the only witness examined." No attempt was made to produce evidence of a license, or to account for the non-production of it, in reference to either of the ceremonies. Nor was there any evidence that Norval Coleman was, or pretended to be, or was supposed to be, a preacher, minister, or official of any sort, — or that the ceremony performed by him was followed by the cohabitation of defendant and Joe Tunstall. The latter affair may have all occurred in sport. Certainly, not enough is proved to show that it was of so serious a character as to implicate the defendant, by it, in the crime of bigamy.

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The court charged "that marriage in cases of this kind could be *proven* by cohabitation, living together, *or* the confessions of the parties; that it was like any other civil contract in this respect, and that it was not necessary to show by proof that the requirements of the statute were conformed to, to establish a marriage in either case; that it was not necessary to show the authority of the parties who solemnized the marriage," &c.

The first part of the charge, that marriage in a case of this kind can be proved by cohabitation alone, is not correct. If it was, every case of living in fornication or adultery would establish a marriage, or case of bigamy.

It might be true in some cases that it is not necessary to show that the requirements of the statute have been conformed to, in order to establish a marriage, and that the authority of the person who performs the ceremony need not be proved. But the charge must be construed with reference to the evidence. And it is not correct to so charge the jury in a case like the present.

The only witness was an ignorant negro woman, who probably was unable to understand the meaning of what was actually said or done. No words or expressions are proved to have been used on the occasion, that are employed in contracting marriage, and no cohabitation afterwards is shown by the evidence. The maxim that every one is to be presumed innocent until the contrary is proved is of little value if the law did not require, in such an instance as this, either proof of a marriage license, or official authority in the person performing the ceremony, or something else to establish that the affair in which the parties were engaged was seriously entered into as a contract of marriage between them.

For the errors indicated, the judgment is reversed, and cause remanded.

Defendant must remain in custody until discharged by due course of law.

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Indictment for Forfeiting Recognizance, under Act of December 11th, 1873.

1. "Act to regulate confinement and discharge of persons charged with misdemeanors;" to what applies. — "The act to regulate the confinement and discharge of persons charged with misdemeanors," approved December 11th, 1873, applies as well to proceedings before a justice of the peace as to prosecutions before the county and circuit courts.

2. *Same*; what competent evidence on trial of indictment for violating. — On the trial of an indictment for the wilful failure to appear, after entering into the recognizance, the bond or undertaking entered into is relevant evidence.

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3. *Charge to jury; when refusal to give will not be noticed.* — The refusal to charge the jury to acquit the defendant if they believe the evidence cannot be revised when all the evidence is not set out in the bill of exceptions.

APPEAL from Circuit Court of Jefferson.

Tried before Hon. W. S. MUDD.

The appellant, John Avery, was indicted for the wilful failure to appear and answer a charge of petit larceny, after having been released on his own recognizance, under the act of December, 1873, "To regulate the confinement and discharge of persons charged with misdemeanors."

The testimony taken on the trial shows that one Worthington, having some hogs stolen and suspecting Avery, made affidavit to these facts, to obtain a warrant to search Avery's house. The officer finding the stolen property arrested Avery, and brought him before the magistrate, where Worthington made an affidavit charging Avery with petit larceny. Avery being actually in custody, no warrant issued for his arrest, and the magistrate was about to proceed with the trial when Avery asked for a postponement for two days, which was granted, and the case continued until that day. The defendant executed his own bond, without security, for his appearance on that day, under the act of December 17th, 1873. The magistrate explained to him the consequences which would follow if he failed to appear, and having approved the bond allowed the defendant to depart. The defendant failed to appear on the day required.

On the trial, the State, after proving the execution and approval of the appearance bond, offered to read it as evidence. The defendant objected, but his objection was overruled, and he excepted.

The bill of exceptions does not purport to set out all the evidence.

The court charged the jury if they believed, from the evidence, that the defendant did wilfully fail to attend to answer the charge against him as required by law, at the time and place to which the trial had been adjourned by the justice of the peace, and that all of the proceedings were had, as testified to, in Jefferson county, that defendant could be found guilty under the indictment.

The defendant excepted to the giving of this charge, as well as to the refusal to charge the jury at his request, that they must find him not guilty if they believed the evidence.

ELLIS PHELAN and R. H. PEARSON, for appellant. — The appellant does not come within the letter of statute. He was never arrested on any *capias* or warrant of arrest; as the officer had already taken him in custody without a warrant. The

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law is highly penal and must be strictly construed. It does not apply to a *continuance* before a justice of the peace.

JOHN W. A. SANFORD, Attorney General, *contra*. — The act of December 17th, 1873, applies to all misdemeanors. The statute being in furtherance of liberty should receive a liberal construction as to the classes of persons within its operation. The case of *Giles v. The State*, *ante*, p. 29, disposes of all the other questions in the case.

MANNING, J. — Appellant was prosecuted and found guilty, under the act No. 11, approved December 17, 1873, of wilfully failing to attend and answer to a charge of petit larceny, after having been discharged upon his own recognizance to attend at the office of a justice of the peace at a time and place therein specified to answer before one Moore, a justice of the peace of said county, for said offence. The time for his appearance was two days after that on which the recognizance was made, and the magistrate read the act over to him, and carefully explained the consequence that would ensue if he failed to attend at the time appointed according to the obligation. He did not attend.

The record discloses that on the day when the recognizance was given, defendant said "he was not ready for trial, and asked for a postponement of the same in order that he might have his witnesses summoned," and the trial was postponed accordingly to the day, on which he entered into a recognizance without a surety to appear.

It is he insisted for defendant that this law being highly penal must be strictly construed, and ought to be held not to apply to a case before a justice of the peace. We do not, after a careful examination of the statute, see in it any reason for so restricting its operation. Its language is as applicable to a proceeding before a justice of the peace, as before a circuit court, county court, or criminal court, and does not permit such a limitation of its meaning.

The recognizance or undertaking entered into by the defendant for his appearance was a proper — probably an essential part of the evidence in the cause; hence, there was no error in overruling the motion to exclude it.

The bill of exceptions does not show that it sets forth all the evidence in the cause; therefore, without comment on what it contains, we could not hold that the court erred in refusing to give the charge, that if the jury believe all the evidence still they must find for the defendant.

The law required the defendant to appear on the day set for the trial; and the mention of the time in the bond on

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which the trial was to be had only gave defendant more specific information of the day when he was required by law to attend and answer. We do not perceive that this in any manner changed the conditions prescribed by law, or exonerated defendant from compliance with the stipulation to appear, that was contained in the bond or undertaking.

There is no error in the record, and the judgment is affirmed.

The officers on whom the duty is devolved must proceed to carry the sentence of the court into effect, and to execute the same.

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Indictment for Assault with Intent to ravish.

1. *Charge to jury; what not erroneous.* — After charging the jury on defendant's written request, as to the ascertainment of the sense and meaning in which he used a particular word, it is not error to further instruct the jury that they must look to the evidence in order to determine that question.

2. *Oath of jury; what sufficient.* — A recital in the record that the jury "were duly empanelled, sworn, and charged well and truly to try the issue joined between the defendant and the State of Alabama," sufficiently shows that the jury were sworn as required by law.

APPEAL from the Circuit Court of Covington.

Tried before Hon. JOHN K. HENRY.

The defendant was indicted for an assault with intent to ravish. On the trial the female testified that he came to her house, and having driven away a boy who was there, caught hold of her person, with the remark: "I have come for, and I intend to have it;" that she resisted, and that he pushed her up against the bed, and said, "I intend to have it right now, or I will kill you." This was all the evidence relating to the assault, and the defendant asked the following charge in writing in reference thereto: "That although the defendant may have told the person upon whom the offence purports to have been committed, that 'he would kill her unless she let him have it,' yet unless there is some evidence showing what was meant by the word 'it' the jury cannot convict the defendant of an assault with intent to ravish," which the court gave, but added: "Gentlemen, I further charge you in relation to that, that you must look to the evidence in order to determine what the defendant meant by the word 'it.'" To which "qualification" by the court defendant duly excepted, and now insists that the additional charge was a qualification and erroneous. The judgment-entry recites that the jury "were well and truly sworn to try the issue joined between the defendant and the State of Alabama."

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B. M. STEVENS and J. M. WHITEHEAD, for appellant. — The additional charge given by the court is a qualification, and therefore erroneous. Rev. Code, sec. 2756; *Lyon & Co. v. Kent, Payne & Co.* 45 Ala. 65; *Edgar v. The State*, 43 Ala. 45; *Myatt & Moore v. Bell*, 41 Ala. 222. This is the affirmative declaration of the law, and negatives all other modes of procedure.

II. The judgment-entry of the court below fails to show that the accused had been tried by a jury sworn according to law. Revised Code, sec. 4092; *Gardner v. The State*, 48 Ala. 263; *Johnson v. The State*, 47 Ala. 9; *Smith v. The State*, 47 Ala. 540.

JOHN W. A. SANFORD, Attorney General, *contra*. — There was no error in the charge instructing the jury that they must look to all the evidence to ascertain the purpose of the accused, and the meaning of the words used by him. *Carter v. Lee*, 33 Ala. 430; *Rosenbaum v. The State*, 33 Ala. 354.

The jury were sworn according to law. The record shows almost a literal compliance with the statute. *Gardner v. The State*, 48 Ala. 263.

MANNING, J. — When the court, at the request of a defendant in writing, has given a charge to the jury in respect to the ascertainment of the meaning with which a particular word alleged to have been used by defendant was employed, it is not error for the court further to instruct the jury, that they must look to the evidence in order to determine what defendant meant thereby. *Hogg v. The State, ante*, p. 2; *Morris v. State*, 25 Ala. 57; *Rosenbaum v. The State*, 33 Ala. 354.

The recital in the record in regard to the jury being sworn is sufficient. It was not intended by such recital in the judgment-entry to set forth the oath at length, but only to show that the jury had been sworn. And when no objection is taken in the court below to the form of the oath administered, it will be presumed that it was done in proper form. *Bush v. The State, ante*, p. 13; *Crist v. The State*, 21 Ala. 137; *McGuire v. The State*, 37 Ala. 161.

Judgment affirmed.

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Indictment for Arson.

1. *Arson; degree of; test for distinguishing indictment.* — Under a statute dividing arson into three degrees, and clearly defining the circumstances which constitute arson in the first and second degrees, and providing that "arson committed under such circumstances as do not constitute arson in the first or second degree is arson in the third degree," an indictment merely charging arson in the general words of the statute, and following the analogous forms given for the higher degrees, without alleging any fact or circumstance which constitutes arson in the first or second degree, is necessarily an indictment for arson in the third degree, and is sufficient in form and substance.

2. *Arson in the third degree; value of property burned immaterial.* — The value of the building and contents burned is not an element of the offence in arson in the third degree.

3. *Same; relevancy of evidence on indictment for.* — In an indictment for arson in the third degree where the building is designated a "corn crib," proof that "corn and fodder were kept in it" is relevant and proper to show that the building was such an one as described in the indictment; but proof of what was in it at the time it was burned is irrelevant, and should be excluded on motion. An objection to the whole of such testimony, not distinguishing between the legal and illegal, is properly overruled.

4. *Motion in arrest of judgment; on what predicated.* — Motion in arrest of judgment can only be predicated upon matter which appears of record without the aid of a bill of exceptions.

5. *Disqualified juror; objection to, how waived.* — A party who knows of the want of qualification of a juror and accepts him nevertheless, or fails to make inquiry as to the matter, cannot afterward be heard to complain of such disqualification.

APPEAL from Circuit Court of Bullock.

Tried before Hon. H. D. CLAYTON.

The indictment in this case contained two counts. The first charged that "Joe Brown and Bama Hicks wilfully set fire to and burned a building, to wit a corn crib of Henry Grady," against the peace, &c. The second count charged that the defendants "wilfully set fire to and burned a building, to wit a barn of Henry Grady, against the peace," &c. It was demurred to: 1st. Because "it charged no offence known to the criminal law." 2d. Because, "as an indictment for arson in the third degree it was defective, and failed to show the setting fire to or burning was of any house or building under such circumstances as do not constitute arson in the first or second degree."

The demurrer was overruled, and defendants went to trial on a plea of "Not guilty."

On the trial, the State introduced evidence to show "that the alleged offence was committed by setting fire to and burning a crib in which the prosecutor kept corn and fodder, and then had corn and fodder therein." Defendants objected to the admission of this evidence, but their objection was overruled, and they duly excepted. Defendants then asked the witness "if

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the crib burnt was within the curtilage of the dwelling," and on receiving an affirmative answer, moved to exclude the answer. The motion was refused and defendants excepted. The jury having found the defendants "guilty as charged in the indictment," they moved in arrest of judgment on the ground "that the verdict was contrary to the evidence and manifestly wrong," and that two of the jurors were incompetent to try the case, as they were neither householders or freeholders.

An entry on the minutes denying the motion recites that two of the jurors were neither householders nor freeholders, &c.

The defendants appeal, and assign as error the overruling of the demurrer and the various rulings of the court to which exception was reserved.

R. H. POWELL and C. J. L. CUNNINGHAM, for appellants.

JNO. W. A. SANFORD, Attorney General, *contra*.

BRICKELL, C. J. — Our statutes divide arson into three degrees, two of which are felonies and the third a misdemeanor. The character of the structures burned, or the circumstances of setting fire to or burning them, which constitutes arson in the first or second degree, are clearly and specifically defined by §§ 3697, 3698, of the Rev. Code, which affix a different punishment to each of those degrees. Section 3699 provides that "any person who wilfully sets fire to or burns any building, house, . . . under such circumstances as do not constitute arson in the first or second degree, is guilty of arson in the third degree." Forms of indictment are given for arson in the first and second degrees, but none for the third.

The test for ascertaining to which of these degrees the offence charged belongs, both according to the forms given and the well settled rules of pleading, is the statement of facts contained in the indictment. By these the law fixes its character and pronounces the degree of crime charged. If the facts are stated which are necessary to constitute arson in the first degree, the indictment is a charge for that offence. If circumstances are stated in connection with the arson charged, which make a case within the influence of the second degree, the indictment is necessarily a charge for that offence. So, too, if facts are charged which constitute any kind of arson, and nothing is averred as to any circumstances which would make the offence arson in the second or first degree, the indictment, if otherwise sufficient, is an indictment only for the third degree. The defendant is in no way misled by such a charge;

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upon the facts stated there can be no conviction of a higher degree than the third, and he cannot be called on to meet any charge of arson "under circumstances constituting arson in the first or second degree." As already stated, the legal effect and meaning of the charge arises from the facts averred, and if facts constituting arson in the first or second degree are omitted, the facts stated (if they amount to a legal charge of arson) are tantamount to a declaration or averment that as to that offence no such circumstances existed; or, in other words, that the offence was done "under such circumstances as do not constitute arson in the first or second degree."

It is true that an indictment will not be upheld by intentment; but that rule has no such application to an indictment (which upon only those facts stated in it does charge an indictable offence) as to compel the court to hold it insufficient because if circumstances not alleged were added to the facts stated, the offence charged would assume a higher degree of criminality.

The indictment pursuing, as it does, the words of the statute and the analogous forms provided for arson in the first and second degrees, must, according to our decisions as to indictments following the statutory forms, be held sufficient. The objections raised by demurrer that the indictment charged no offence, and that it did not show that the "setting fire to or burning was of any house or building under such circumstances as do not constitute arson in the first or second degree," were properly overruled.

II. There is nothing in the objection to the ruling of the court permitting the prosecutor to state that the building burned "was a crib in which he kept corn and fodder, and in which he then had corn and fodder." Such a crib is undoubtedly such a structure as comes within the provisions of § 3699; broader words could hardly be used than "house" or "building," and a corn crib is certainly both a house and a building. In arson in the third degree, the value of the building burned is not an element of the offence; it is only in the burning of certain classes of buildings, mentioned in § 3698 of R. C., that value is material. It was therefore immaterial that no value was proved. Nor was there any error in refusing to rule out the foregoing testimony, after the defendant had proved by the prosecutor that the corn crib burnt was in the curtilage of the dwelling-house. Setting fire to a barn within the curtilage of a dwelling-house does not of itself constitute arson in the second degree under § 3698 of the Code; some other building mentioned in that section must be burned thereby, before the burning of the barn within the curtilage can constitute arson in the second degree. The evidence as to the barn's being

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within the curtilage did not prove a higher degree of arson than that charged, or show a variance. The evidence as to what was in the crib at the time it was burned was irrelevant, although it was proper to show the purpose for which the building had been used, by the testimony that "he kept corn and fodder in it," in order to identify it with the kind of crib described in the indictment — to wit, a "corn crib." The objection made by the defendant was to the whole of the testimony; and as part of the testimony was unobjectionable, and the objection was levelled at the whole, the court rightly overruled the objection. Besides, we cannot see how the evidence that corn and fodder were in the barn at the time it was burned could have prejudiced the defendants.

III. The motion in arrest of judgment, as it is called, was properly overruled for several reasons. The question sought to be raised did not properly appear of record, and was not, therefore, matter of arrest of judgment. If the statements in the entry overruling the motion in arrest of judgment were held sufficient to justify this court in revising the action of the court below, we could not reverse. It does not appear that the defendants were ignorant of the want of qualification of the two jurors at the time they accepted them, or that the defendants made any inquiry upon this point before the jurors were accepted. For aught that appears in this record the defendants may have known of this disqualification, and speculated upon the chances of a verdict, intending to avail themselves of the objection only in event of a conviction. This is not permissible. *People v. Stonecipher*, 6 Cal. 405; *Booby v. State*, 4 Yerg. 111; *Commonwealth v. Norfolk*, 5 Mass. 435; *Van Blaicum v. People*, 16 Ill. 364.

It results from what has been said that the judgment must be affirmed.

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Indictment for Murder.

1. *Russell circuit court; authority of at special term.* — The circuit court of Russell had authority to compel the trial of a criminal case at the special term, held under the act of December 11th, 1874, although the case had been regularly reached and continued at the preceding regular term.

2. *Venire; what not ground for quashing.* — The want of qualification of any of the persons summoned as jurors is not ground for quashing the venire; neither is the fact that one or more of them were designated by the initial letters of their christian names instead of their full christian names, especially when defendant has not been thereby deceived or misled.

3. *Murder in second degree; what definition of not erroneous.* — A definition of murder in the second degree as "the unlawful killing of a reasonable person with malice aforethought, either express or implied," is not erroneous.

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4. *Conviction for lower degree of murder ; acquittal of higher.* — Where defendant has been convicted of murder in second degree, and obtains a reversal, he cannot afterwards be put on trial for the higher degree.

5. *Murder in second degree ; charge as to, what erroneous.* — A charge that "murder in the second degree includes those cases of constructive murder which are not accompanied with the intent to take life, but are committed by gross carelessness, or in the commission or attempt to commit some other crime than arson, rape, robbery, or burglary, and that the jury cannot convict of murder in the second degree if they believe the killing was malicious, or was not committed in the commission or attempt to commit some other crime than above specified," is calculated to mislead the jury, and is properly refused.

APPEAL from Circuit Court of Russell.

Tried before Hon. J. E. COBB.

The appellant, O. A. Fields, was indicted for the murder of Jesse Dumas. He was tried at the Fall term, 1872, convicted of murder in the second degree, and sentenced to ten years' imprisonment in the penitentiary. On his appeal, this court reversed the judgment and sentence, and remanded the case for a new trial. See *Fields v. The State*, 47 Ala. 603.

After the reversal of the cause it was regularly continued from term to term. A special term of the circuit court was held on the 11th day of January, 1875, in pursuance of "An act to authorize the judge of the 9th judicial circuit of the State of Alabama to hold a special term in Russell county." Approved December 11th, 1874. The provisions of this statute are set out in the opinion. The defendant objected to being put on trial at that term, because at the regular term, in November, 1874, the case had been regularly reached and continued. The court overruled this objection, and the defendant excepted. The defendant then moved to quash the *venire*, "upon the ground that all of the jurors summoned for his trial were not residents of Russell county, and offered to introduce proof on this point which the court refused to allow, and without hearing proof overruled the motion, and defendant excepted.

In empanelling the jury one William Dawson was drawn, who stated that he was not a citizen of the State or of the United States ; whereupon the defendant again moved to quash the *venire*, but his objection was overruled, and he excepted.

When T. H. Moody, one of the jurors on the list served on prisoner, was drawn, "he stated that his name was Thomas H. Moody, and that he was commonly called Tom Moody, T. H. Moody, and Thomas H. Moody, indifferently, and that he was the person summoned by the sheriff as a juror in the case." The defendant moved the court to discard the name of Moody and substitute some other person in his place. This motion was overruled, and defendant duly excepted.

The evidence introduced on the trial was not materially variant from that given on the former trial, and reported in the

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47th volume of Alabama Reports, pages 603-9. The substance of the evidence was that at noon of the same day on which the killing occurred, the deceased met prisoner at the house of a neighbor, called prisoner a "gin-house burning, thieving son of a bitch," and on prisoner's declining to fight twisted his nose, struck him in the face with his hat, and jerked him off the steps on which he was sitting. The prisoner made no resistance, and immediately went home. On his arrival there he took his shot gun, fired it off and reloaded it with buck-shot in each barrel. The deceased rode by prisoner's house, on his way home, about sundown. The prisoner came out and shot deceased as he was sitting on his horse in the road.

The court, in its charge to the jury, instructed them that the defendant having once been tried on the indictment and found guilty of murder in the second degree, could not be convicted of any higher offence, and then proceeded to charge upon the various other grades of homicide. To a portion of the charge, defining murder in the second degree, as well as to the refusal to give a written charge requested on that subject, the defendant duly excepted. The charge given and that refused are both set out in the opinion, and need not be here repeated.

The various rulings to which exception was reserved are now assigned as error.

LYMAN W. MARTIN and G. W. GUNN, for appellant. — The special act authorized a term for the purpose of disposing of "*unfinished*" business. At the special term the jurisdiction of the court was confined to business which had *not been disposed of*. This case had been *disposed of* by a continuance. The juror Moody should have been discarded, and another person summoned in his place. *Bill v. The State*, 29 Ala. 34. The charge given ignores the distinction between express malice and implied malice, as applicable to the different degrees of murder under the statute. For this reason it was proper to ask the charge which appellant requested, and its refusal was error. If *express* malice is shown, the killing cannot be murder in the second degree.

JOHN W. A. SANFORD, Attorney General, *contra*. — The act authorizing the special term is constitutional. *Dorman v. The State* 34 Ala. Appellant had no vested right to put off his case because it had been continued at the last regular term; until an acquittal or conviction, or some order disposing of the case finally, it was "*unfinished* business." The motions to quash were properly overruled. 40 Ala. 698; 29 Ala. 34. The court did not err in refusing to exclude Moody and substitute another juror in his stead. 35 Ala. 399. The charge given was

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correct. Roscoe Crim. Ev. 690. The charge refused was calculated to mislead the jury. 48 Ala. 159; 24 Ala. 67.

BRICKELL, C. J. — The statute of December 11, 1874 (Pamph. Acts 1874-5, p 209), required the judge of the 9th judicial circuit to hold a special term of the circuit court for Russell county, on the second Monday in January, 1875, continuing for three weeks, "for the trial and disposal of all criminal and civil business left unfinished at the last regular term of said court." If a doubt could exist as to the character of business over which the court at this special term had authority and jurisdiction, — or, rather the character of the business, intended to be designated as "business left unfinished at the last regular term," — it is removed by the subsequent provisions of the statute. First, the court is expressly clothed "with full, complete, and plenary jurisdiction in and over all unfinished business, to the same extent and in the same manner as if said special term, herein provided for, was a regular term of said court." Grand and petit juries are to be drawn and summoned to attend its sitting. All bail pieces and bonds for the appearance of parties are made answerable to this special term; and then, as if to render "assurance doubly sure," as to criminal causes, it is declared, "that in all indictments heretofore found in said circuit court, and when the parties shall have been arrested before said special term, or during the term thereof, the same shall stand for trial at said special term." We cannot doubt, nor do we see how it could have been more clearly expressed, that it was intended that the court, at this special term, should have over the business pending, not complete and put an end to by final judgment, the jurisdiction and authority it could exercise at a regular term. The competency of the general assembly to authorize special terms, and to compel the appearance of parties in civil or criminal causes, at its sitting, cannot now be questioned. It is a power of frequent exercise since the formation of the state government, and its existence is now beyond the pale of controversy. The objection of appellant to a trial, resting solely on the ground of the want of authority in the court, because it was a special term, was properly disallowed.

2. The several motions to quash the *venire* were properly overruled. The want of requisite qualifications in any of the persons summoned as jurors is matter of challenge for cause, which must be disclosed in a case of this kind before a person can be put on the State or the accused for acceptance or rejection, and would lead to his exclusion by the court, *ex mero motu*. The summoning of such persons must sometimes occur from the inadvertence, or ignorance of facts, in the officer charged with

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the duty of summoning, and is not ground for setting aside the *venire*. *Hall v. State*, 40 Ala. 705.

Nor was it cause for quashing the *venire* that one or more of the persons named in it were designated only by their initial letters, instead of their full christian names. *Aiken v. State*, 35 Ala. 399; *Bill v. State*, 29 Ala. 38; R. C. § 4175. We do not approve the practice of using initials only, to designate christian names, in any paper pertaining to judicial proceedings, but it has prevailed too long to be treated as vicious. No good reason could be assigned for sustaining the objection made on this ground to the *venire*; it was not alleged the appellant had been misled or deceived as to the person intended to be designated; and it did appear he was generally known by the use of initials.

3. The defendant was properly put on trial for murder in the second degree, and not for murder in the first degree. The court, in its general charge, gave the following definition of murder in the second degree: "Every homicide which the evidence establishing it fails to show to be murder in the first degree, but which the evidence does show to be murder at common law, is murder in the second degree in Alabama. Murder in the second degree may be defined the unlawful killing of a reasonable person, with malice aforethought, either express or implied. Without malice there cannot be murder. With malice as the prompting motive there is always murder." This charge was followed by a correct definition of malice, and a statement of the evidence of it. The appellant excepted so much of the charge as defined murder in the second degree, and requested the court to charge: "That murder in the second degree, under our statute, includes those cases of constructive murder which are not accompanied with the intent to take life, but are committed by gross carelessness, or in the commission or attempt to commit some other crime than arson, rape, robbery, or burglary; and that if they believe, from the evidence, that the killing was malicious, or was not committed in the commission or attempt to commit some other crime than the above specified, they cannot convict the prisoner of murder in the second degree." This charge was refused and an exception reserved.

4. Murder was defined, or rather described by Sir Edward Coke, in these words: "When a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, express or implied." The description was adopted by Blackstone. 4 Black. 195. There were degrees of criminal homicide at common law, but malice was the distinguishing characteristic of murder. A malicious killing, whether the malice was express

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or implied, — whether it was the result of a sedate, deliberate mind, and formed design; or whether malice was implied from the circumstances attending the killing, — was murder, of equal criminality, and subjected to the same punishment. The assassin who lay in wait with a murderous weapon, and by surprise or stealth took the life of his victim, was not deemed more criminal than he who, without adequate provocation, in unbridled passion, took human life. The one only furnished more indisputable evidence of his guilt than the other. The mind could not resist the conviction that they were not equally criminal, and should not be subjected to the same severity of punishment. The statutes of this State, without changing the common law definition of murder, without adding to or taking away any of its ingredients, as known to the common law, for the purpose of punishment only, have divided it into murder in the first and murder in the second degree. The malignity with which the crime is perpetrated is the criterion by which the one is distinguished from the other degree. "Every homicide perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, malicious, and premeditated killing; or committed in the perpetration of or the attempt to perpetrate any arson, rape, robbery, or burglary; or perpetrated from a premeditated design, unlawfully and maliciously to effect the death of any human being, other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind, regardless of human life, although without any preconceived purpose to deprive any particular person of life, is murder in the first degree; and every other homicide committed under such circumstances as would have constituted murder at common law is murder in the second degree." R. C. § 3653. The killing in any sudden rencounter or affray, by the assailant, with a deadly weapon, which was concealed before the fight, the adversary having no deadly weapon drawn, is murder in the second degree, and may, according to the circumstances, be murder in the first degree. R. C. § 3656. A careful analysis of murder in the first degree, as described in the statute, resolves it into three characteristic ingredients. The first is a specific intention to take life, whether it be the life of the person slain, or of some other human being, deliberately formed and acted upon. The sedate and deliberate mind and formed design of the common law, manifested by lying in wait, or by poisoning, or by any other evidences of wilfulness, deliberation, premeditation, and malice. What these evidences may be, cannot be defined. They spring from the particular facts and circumstances attending the killing. When the killing is perpetrated in the committing or the attempt to commit the

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crime of arson, rape, robbery, or burglary, it is murder in the first degree. The criminal intent which is involved in these offences gives complexion to the unlawful killing perpetrated in their commission. It supplies the malice of the common law, and the specific intention to take life, involved in the other homicides mentioned in the statute. Then, the reckless depravity which at common law imported malice, and which is the equivalent of malice, directed to a particular person, illustrations of which are given in the common law books, "as the going deliberately, and with intent to do mischief, upon a horse used to strike, or coolly discharging a gun among a multitude of people, is presumed to exist." 4 Black. 200.

All other unlawful and malicious killings the statute denominates murder in the second degree. They embrace the homicides in which malice was implied at common law. An affray may have occurred, or a provocation been given, which if acted on in the heat of the passion it would suddenly produce, the law, in tenderness to human frailty, would receive as mitigating an unlawful killing to manslaughter. If, however, the provocation, however sudden, was not of that character which would in the mind of a just and reasonable man stir resentment to violence endangering life; or if between the time it was given and the killing, "cooling time," as it is quaintly and forcibly expressed in the older books, — time in which passion would have subsided unless wrath had been nursed, — intervened, the killing would be murder. The malice was implied, because violence was carried too far, or because it was supposed the provocation was seized upon to gratify revenge. Such a homicide may also have been attended with evidences of express malice, as in the preparation for the killing, or the weapon employed, or some other evidence of it. Yet, the provocation may rebut the existence of the wilfulness, deliberation, premeditation, and malice, which must concur in murder in the first degree. A killing may also be reckless, without evincing a purpose to take the life of any particular human being, and without evincing the degree of depravity shown in the illustrations we have mentioned. There may be no purpose to do mischief; as if one from a house-top recklessly throws down a billet of wood upon the sidewalk, where persons are constantly passing, and it fall upon a person passing by and kill him. *Moore v. State*, 18 Ala. 532. No more accurate definition of murder in the second degree can be given than that found in the statute, — a malicious and unlawful killing under other facts or circumstances than those enumerated as constituting murder in the first degree. The charge given by the court was of consequence correct. The charge requested was properly refused. It would have misled the jury into the supposition

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that no other homicides than those it specifically enumerates were murder in the second degree.

The judgment must be affirmed.

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Indictment for Larceny.

1. *Confessions of guilt; what admissible.* — Where the owner of stolen property not suspecting the defendant, offered him a reward if he would get the property and thief, and the defendant a few days thereafter brought back the property and demanded the reward, and on being refused because he had not brought the thief, replied that *he* was the thief, and again demanded the reward, such declarations are properly admitted against him, on a trial for the larceny of the property, as confessions of guilt.

2. *Same.* — It is not error to instruct the jury that they must take the confessions in connection with other evidence in the case, and give it such weight as they might think proper.

3. *Sentence; what sufficiently definite.* — A sentence to hard labor for the county for a given period, and also for a "sufficient length of time to pay all the costs and officer's fees in the case, not exceeding forty cents per day," in the absence of any objection in the court below, is sufficiently certain, and will not be disturbed by the appellate court.

APPEAL from Circuit Court of Wilcox.

Tried before HON. JOHN K. HENRY.

The appellant was convicted of the larceny of a saddle, the property of one Tom Smith. On the trial the State introduced the owner of the saddle, who testified that it and the blanket were stolen from his horse; "that he told defendant, a negro house servant aged about nineteen years, who was not suspected, if he would find the thief and the saddle he would give him five dollars, and about one week thereafter defendant brought back the saddle, and asked for the reward; that witness refused to pay the money unless he brought back the thief; that defendant then said *he* was the thief, whereupon witness refused to give him the five dollars, saying he would not pay a man for stealing his saddle." The court permitted these declarations to go the jury as confessions of guilt, against the objection and exception of defendant. Referring to these declarations, the court charged the jury that they "must take such confessions in connection with the other evidence in the case, and give them such weight as they thought them entitled to." The defendant excepted to the giving of this charge.

The judgment-entry shows that the defendant was sentenced to hard labor for the county, "for and during the period of three months, and is further sentenced to hard labor for said county for a sufficient length of time to pay all the costs and officer's fees in this case, at not exceeding forty cents per day."

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No objection was taken to this judgment in the court below, but it is now insisted that it is insufficient.

JOHN MCCASKILL, for appellant. — The confession appears to have been made with the hope of worldly advantage of a temporal nature, and should have been excluded. Greenleaf Ev. § 220. The judgment-entry should show on its face for what time the defendant was to be held in custody. It is too uncertain. One has to consult other record evidence to ascertain what the effect of the sentence is.

JOHN W. A. SANFORD, Attorney General, *contra*. — The acts and declarations of the prisoner were properly received as confessions of guilt. 35 Ala. 399; 40 Ala. 314; *Franklin v. State*, 28 Ala. 8. The offer was not made to induce the confession. No efforts had been made to procure one. It was *voluntary*, and made deliberately. No objection was made to the sentence in the court below.

JUDGE, J. — The reward offered was for the delivery of the saddle and the detection of the thief, and not to induce a confession of guilt from the prisoner, who was not even suspected of being the guilty party. The confession was voluntarily made, without the appliances of hope or fear, by any other person, and the circuit court did not err in permitting it to be introduced as evidence. Nor did the court err in its charge given to the jury, that they must take the confession in connection with the other evidence in the case, and give it such weight as they might think it entitled to.

The court sentenced the prisoner to three months' hard labor for the county of Wilcox, and then imposed additional hard labor for the county for a term sufficient to cover all costs and officers' fees in the case, allowing not exceeding forty cents per diem for the additional labor imposed. This was in strict conformity to section 4061 of the Revised Code, if the costs were not presently paid. It does not appear from the record that the costs were, or were not paid; and, as to this question, in the absence of an objection in the court below, we must presume in favor of the correctness of the sentence.

It was not necessary, as is contended, that the court should have prescribed the precise number of days for the additional labor. The costs were to be taxed by the clerk, for which the labor of the prisoner was to pay, at a compensation therefor of not exceeding forty cents per diem. This was sufficiently certain.

Let the judgment be affirmed.

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Indictment for Arson.

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1. *Arson in first degree; what sufficient finding to authorize sentence for.* — The first of the three degrees of arson is the only one on conviction of which the jury is authorized to affix imprisonment in the penitentiary; and a general verdict of guilty, returned on an indictment charging arson in the first degree in a single count, and affixing imprisonment in the penitentiary, is therefore sufficient to authorize sentence for that offence, although the verdict does not expressly state the degree of which defendant is convicted.

2. *Same; property, in whom laid.* — Although the building burned is situated on the premises of another, the ownership is properly laid in the name of a servant who dwelt in the house, the owner having given her possession for that purpose under a contract of hiring which bound him to do so as long as she remained in his service.

APPEAL from Circuit Court of Wilcox.

Tried before Hon. JOHN K. HENRY.

The opinion states the case.

JOHN McCASKILL, for appellant. — The ownership was improperly laid. *Cowan's case*, in 2 East Pleas Crown, 1023; Bishop Crim. Law, § 39. The verdict of the jury did not respond to the issue, and the motion in arrest of judgment should, therefore, have been granted.

JOHN W. A. SANFORD, Attorney General, *contra*, cited 2 Russ. on Crimes, 564; 1 Bish. Crim. Proc. § 721.

BRICKELL, C. J. — Arson at common law was the malicious and wilful burning of the house or outhouse of another. It was peculiarly an offence against property, and its possession. Therefore the burning one's own house, of which he had possession, was not arson; though if the house was in a town, or so near to the houses of others as to endanger them, it was a high misdemeanor. 2 Russ. Crimes, 548. The statutes not only enlarge the subjects of arson, but it is a felony, or a misdemeanor, visited with punishment differing in severity, according to the circumstances attending the act, and the character of the subject. It is divided into three degrees, — the first having reference specially to the protection of human life, the second to the character of the thing to which fire is set, or which is burned, the third essentially to the protection of property merely. The first may be punished capitally, the second by imprisonment in the penitentiary for a term not less than two nor exceeding ten years, and the third by fine and imprisonment, or hard labor for the county, for a period not exceeding twelve months. R. C. §§ 3697-8-9.

The indictment against the appellant pursues the form pre-

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scribed by the Code, and charges arson in the first degree, by the wilful setting fire to, or burning in the night-time, the dwelling-house of Jennie Pharr, in which there was, at the time, a human being. R. C. p. 811. On a conviction for arson in the first degree, the jury are required to determine the punishment, subject only to the restriction that it shall not be less than hard labor for the county, or imprisonment in the penitentiary for a term of ten years. Arson in the second degree is punished by imprisonment in the penitentiary, or hard labor for the county, but the court, not the jury, fixes the term; and arson in the third degree is not punishable by imprisonment in the penitentiary. The jury having returned a general verdict of guilty, not expressing the degree of the offence, but affixing ten years' imprisonment in the penitentiary as the punishment, the defendant moved in arrest of judgment, because the jury had not found the degree of the offence. The indictment contains a single count, charging specifically every fact necessary to constitute the offence of arson in the first degree. The verdict is of guilty, and the punishment is by the jury affixed at ten years' imprisonment in the penitentiary. This verdict is necessarily an ascertainment of the degree of the defendant's guilt as certainly and expressly as if the jury had declared in so many words that arson in the first degree was the offence found by them. For no other offence could they have affixed punishment by imprisonment in the penitentiary. A verdict which clearly and unambiguously, without reasonable doubt, informs the court of the result and extent of the finding of the jury, is sufficient. There was no error in overruling the motion in arrest of the judgment. The question is analogous to that presented by a verdict on an indictment for murder, not expressly finding the degree of crime. The statute expressly requires that the jury must in express terms declare by their verdict whether the defendant is guilty of murder in the first or second degree; and if the defendant should plead guilty, a jury must nevertheless be empanelled to determine the degree of the crime. R. C. § 3657. No such requirement is made in reference to arson.

In an indictment for arson under the statutes, as at common law, the ownership of the house burned must be alleged, and proved as laid. *Martha v. State*, 26 Ala. 72. The house burned is laid in the indictment as the property of Jennie Pharr. The evidence disclosed that it was situate on the premises of one Alford, to whom Jennie was hired as a servant at monthly wages, under a contract by which Alford was bound to furnish her a house in which to live; that he had placed her in the possession of this house, and she was occupying it

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as her dwelling, when the offence was committed. The circuit court ruled that the ownership of the house was properly laid in Jennie, under this state of facts, and we concur in that opinion.

In the case of *The People v. Van Blaicum* (2 Johns. 105), it is held, if one be indicted for burning the dwelling-house of another, it is sufficient if it be, in fact, the dwelling-house of such person. The court will not inquire into the tenure or interest which such person has in the house burned. It is enough that it was his actual dwelling at the time. In 1 Bish. Cr. Pro. § 573, the rule is stated to be that the house must be laid to be the dwelling-house of the real occupier. Jennie Pharr, in whom ownership is laid by the indictment, under the evidence, had a right to use and occupy the house, during her term of service. Alford was bound to furnish her a house, and the stipulation of the contract in this respect was as obligatory on him as the payment of her wages. Her occupancy was then not merely permissive, but founded on a valuable consideration, the equivalent of rent to a landlord. It was in her own right, as a tenant, for her own benefit, and not for the mere convenience or use of her employer. 2 Whar. Cr. Law, § 1579. The ownership was therefore properly laid in her, and not in her employer, whose right was not to the immediate use and occupation, but was in reversion, on the expiration of her term of service.

The judgment is affirmed.

Chappell *et al.* v. The State.

Indictment for Robbery.

1. *Robbery; indictment for, what sufficient.* — In indictments for robbery under the Code, if the felonious intent is averred, the taking of the property from the party robbed may be charged to have been "against his will, by violence to his person," or "by putting him in such fear as unwillingly to part with the same," in different counts or in the same count in the alternative. In either case the omission to charge the felonious intent is fatal.

2. *General verdict, referred to good count.* — A general verdict of guilty, responding to the whole indictment, will support a judgment of conviction if any one count is sufficient.

APPEAL from City Court of Montgomery.

Tried before Hon. JOHN A. MINNIS.

The opinion states the case.

J. M. FALKNER and JOHN GINDRAT WINTER, for appellant. — 1. The first count is defective because it fails to charge a felonious intent. Wharton Precedents, 411; 18 Ala. 538.

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The second is bad, because it does not show that the taking was "against his will." 11 Humphreys, 167; 12 Ga. 293; 3 Wash. C. C. 209; Form No. 12, p. 809 R. C. The allegation, "by putting him in such fear as unwillingly to part," &c., is not equivalent to an averment that the taking was *against his will*. The Code punishes, but does not define robbery, and hence, common law averments are not dispensed with. A person may take a nauseous dose of medicine *unwillingly*, and yet will to do it.

JOHN W. A. SANFORD, Attorney General, *contra*. — 1. The indictment is in substantial compliance with the forms of the Code, and therefore sufficient. 30 Ala. 57. The omission of the word "feloniously" in the first count, and the words against his will in the second count, was at most a mere defect of form, and "did not prejudice the substantial rights of the defendant on the trial." Rev. Code, 4142. The omission was cured by verdict. 1 Russ. on Crimes, 903. If either count is good the sentence will stand. 18 Ala. 547; 40 Ala. 684.

MANNING, J. — Appellants were found guilty upon an indictment by which it was intended to charge them with the crime of robbery; and a motion in arrest of judgment was made on the ground of insufficiency of the indictment. In this there are two counts; the first of which is in the form prescribed by the Revised Code (p. 809, Form No. 12), except that it does not contain the word "feloniously," in charging the acts constituting the offence. This omission is fatal. Without it, or some corresponding expression, there is nothing in the indictment to show that the persons engaged in the affair were not merely indulging in mischievous sport, instead of being actuated *animo furandi*. The second count is like the form in the Code, including the word "feloniously," except that it does not contain the expression, "and against his will, by violence to his person." The words "against his will" were held essential at common law, and are retained in the statutory form of the indictment. But as the Revised Code, when an offence may be committed by different means, allows such means to be alleged in the same count in the alternative (section 4123), and if the offence is proved to have been effected by either of these means, the conviction would be good, the form in the Code contains such alternative statements.

The form is as follows: "A. B. feloniously took a gold watch, the property of C. D., from his person and against his will, by violence to his person, or by putting him in such fear as unwillingly to part with the same." Two modes of committing the offence against the injured party are stated: one,

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"against his will, by violence to his person," and the other, "by putting him in such fear as [to cause him] unwillingly to part with the same." In the former case, it is against his will, and by violence; in the latter case his will consents, but only because it is subdued and constrained by fear. A charge that the crime was done in either of these modes is sufficient; but if only one mode is averred, it must be proved accordingly.

The punctuation of the sentence, and the interposition of the particle "and" before the words "against his will," makes it seem, at first view, that the statement at the end of the form in the Code, "or by putting him in such fear as unwillingly to part with the same," is the alternative only to the phrase, "by violence to his person," and that with either of these statements, the words "against his will" are necessary. But we think a just interpretation and due regard to the meaning of the words require us to construe them as above explained.

The second count is, therefore, a good one. And as the verdict is general in response to the whole indictment, and one count in this is good, the verdict and judgment are sustained by it. *Shaw v. The State*, 13 Ala. 547; *Montgomery v. The State*, 40 Ib. 684. Judgment affirmed.

Kelly v. The State.

Indictment for Murder.

1. *Change of venue; discretionary with primary court.* — An application for a change of venue is addressed to the sound discretion of the primary court, and its exercise in granting or refusing the change is not subject to revision. (Overruling *Ex parte Chase*, 43 Ala. 303, and the cases following it.)

2. *Dying declarations; verbal evidence of; when not inadmissible.* — A person who has heard dying declarations may be examined verbally as to them, although a magistrate present took down and reduced to writing declarations made to him, at the same time, which were read over to and approved by the deceased, and were then in the custody of the court.

3. *Same; objection to, when properly overruled.* — An objection to the whole of declarations which are admissible as dying declarations, without pointing out the obnoxious portions or stating the grounds of objection, is properly overruled.

APPEAL from Circuit Court of Dallas.

Tried before Hon GEORGE H. CRAIG.

The appellant, Eugene Archie Kelly, was convicted of the murder of Henry Cunningham, and sentenced to be hanged.

When arraigned he pleaded not guilty, and by consent the 23d day of December, 1875, was set for the trial. On that day he filed a sworn application for a change of venue. The petition alleged that injurious reports of the manner in which the

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killing occurred had been circulated throughout the county ; that, as detailed in the rumors current, the offence had aroused great indignation and feeling in the minds of the community ; that the time had been so short since then that the prejudice thus excited had not yet abated ; that certain persons, who were named, said defendant ought to be hung ; that deceased had many relatives in the county who had inflamed the community against him to such an extent that at one time many persons advocated the summary seizure and execution of defendant. No evidence was offered for or against the petition, and the court after argument refused to grant a change of venue. The parties proceeded to empanel a jury, but before it had been completed eighteen of the persons summoned had stated, on examination as to their qualifications, that "they had a fixed opinion as to the guilt or innocence of defendant which would bias their verdict," and thereupon defendant renewed his application for a change of venue, incorporating in the old petition a statement of what had occurred in the selection of the jury, but the court again overruled the petition, and the defendant again duly excepted.

On the trial Dr. Clarke was introduced as a witness for the prosecution, and testified that he was a practising physician and had examined deceased's wounds, and after doing so had informed deceased that it was necessarily mortal and that he would soon die, to which deceased replied, "Well, I can't help it." After this witness had described the wound and deceased's condition at the time the witness saw him, he was asked if deceased, after he was informed of his condition, made any statement as to who wounded him, and if so, what was said.

The prisoner objected, "on the ground that what was said then and there was taken down in writing, and the writing was the higher evidence. It was then shown to the court that Sumter Lea, Esq., who was then in court, had taken down, at the time and place mentioned by the witness Clarke, what purports to be the dying declarations, and that the solicitor had the writing, which was then exhibited to the court." It was shown that at the time when the deceased made the declarations, after having been informed of his condition, "he was suffering much, and was wellnigh exhausted from loss of blood." The witness Lea testified that he heard all that deceased said, but did not take it down then, but after Clarke left he put questions to the deceased and took down his answers in writing ; the witness Clarke, however, testified that according to his recollection he was present when Lea took down the answers. "Upon this evidence the court overruled the objection, and permitted the witness Clarke to testify as

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to the declarations deceased made to him, and defendant duly excepted." The dying declarations proved by Clarke were in substantial accord with the written statement taken down by Lea. It is unnecessary to refer further to the testimony as to the condition of the deceased, except to say that it clearly showed that he made the declarations under a sense of impending dissolution. After Clarke had finished testifying, the State introduced said Lea, who proved the genuineness of the writing, the circumstances under which the declaration was made, and the further fact that after he had taken deceased's declaration he read it over to him, and, after making some corrections suggested by deceased, it was again read over to him and he approved it. The State then offered to read the written statement in evidence to the jury as dying declarations. The defendant objected on the ground that the State had already been allowed to prove a verbal declaration made at the same time and place, but the objection was overruled, and the writing read in evidence against the objection and exception of defendant. The substance of the dying declaration was that defendant, seeing Cunningham receive the proceeds of a sale of cotton, "told him off the road," on the pretence that he wished to sell him a mule, and when Cunningham had gotten a little ahead, shot him in the back with a double-barrel gun and then robbed him. The wounded man remained where he fell from some time in the morning until about dark, when some wood-cutters, attracted by his cries, removed him. There was other evidence in the case, but none other which is material to the exceptions reserved.

JASPER N. HANEY, for appellant. — The change of venue should have been granted. *Ex parte Chase*, 43 Ala. 305; *Murphy & Ashford v. State*, 45 Ala.

JOHN W. A. SANFORD, Attorney General, *contra*. — I. The first application was too vague and indefinite. Mere belief of prejudice will not authorize the change of venue. The facts and circumstances should be stated. 7 Hill, 147; 10 Grattan, 658; 7 Cowen, 137; 4 Harrington, 582. The last application was made for delay, and was too late. 29 Ala. 34.

II. A change of venue rests in judicial discretion. 7 Ind. 160; 31 Miss. 490; 28 Ala. 28. This discretion is not revisable. 14 Ind. 39; 10 Ala. 814; 8 Blackford, 576. The case of *Ex parte Chase* ought to be overruled; it conflicts with reason and the current of authority, and is contrary to the long established practice in this State. The testimony of Clarke was proper. It could not have injured appellant, even if held to be illegal. It shows a corroboration between the

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written and verbal declarations. The objections to his testimony do not distinguish between the legal and illegal portions and was properly overruled.

MANNING, J. — The defendant in this cause in the circuit court made application upon affidavit, for a change of *venue* from Dallas to some other county, and set out that there were the same reasons why he could not have a fair trial in Perry county.

The judge of the circuit court refused to change the *venue*; and the question is, whether this court will disturb his decision. We should have no hesitation on this subject but for the case *Ex parte Chase* (43 Ala. 303), in which our immediate predecessors, Chief Justice PECK, dissenting, held that the ruling of the court below, denying such an application, was subject to revision and reversal in the supreme court; which decision led to a like determination by them in some other cases.

The law authorizing, upon the application of a defendant in a criminal cause, the transfer of it to another county for trial, is as old as the State itself. But it never was held that the decision of the primary court thereupon was subject to the control of this court. In the *State v. Brookshire* (2 Ala. 303), the court of that day unanimously held, in the language of ORMOND, J., that, "The whole matter must of necessity rest in the discretion of the court [below], to be exercised under a view of all the circumstances, and cannot be reconsidered in this court."

This seemed so satisfactory to the legal profession in the State, that the same question was never again, until after the adoption of the Code of 1852, brought into discussion in the supreme court. A similar point was made, however, in *The State v. Ware*, 10 Ala. 814. The person then under indictment having made application for a change of *venue* from Talladega county, and alleged in his affidavit that the same reasons, upon which that motion was founded, held good in reference to the counties of Benton, Coosa, St. Clair, and Shelby; and the circuit court having ordered the cause to be transferred from Talladega to Benton county, his counsel insisted here, that "after allowing the change of *venue* the court had no discretion as to the county" to which the cause should be sent, for "that such county must be free from the like exception."

But this court, by HENRY GOLDTHWAITE, J., responded: "The whole subject of a change of *venue* is within the discretion of the circuit court, and the exercise of that discretion is not revisable. . . . If the construction of the statute was otherwise, the effect would be to allow the prisoner to select

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the county of trial, after a change of *venue*, whenever his conscience is sufficiently pliant to assert that such counties were subject to the exceptions assigned against that where the indictment is found," &c.

It will be seen that these judges seemed to think there was a manifest propriety, if not a necessity, in allowing the courts in which prisoners were tried to decide finally — not the vital question of the guilt or innocence of the accused, but whether there was any good reason why his trial should not be had in the county assigned for it by the Constitution and law of the land. And this, because such authority ought, according to Judge ORMOND, "to be exercised under a view of all the circumstances;" and because it was absurd, as intimated by Judge GOLDTHWAITE, to allow a prisoner of a pliant conscience to select or dictate in what county he should be tried.

Against these views, not a word of dissent was uttered in either the courts or the legislature. And the law on this subject remained unaltered from the origin of the State to the year 1853. When the first Code, which contained the same sections that are carried into the Revised Code upon this matter, went into effect, was any change thereby made?

The commissioners who prepared that Code were Judge Ormond, (the same who delivered the opinion above quoted from), Judge George Goldthwaite (brother of him who pronounced the other opinion referred to and then himself on the bench of this court), and the late Governor Bagby. And it does not appear probable that such a commission intended to take this important power from a magistrate in whose hands, according to the language of one of them, it "must of necessity rest."

What these commissioners did was, mainly, to codify the statute laws of Alabama. To do this and bring them into proper order, in the concise style requisite, it was necessary to alter very generally the forms of expression in which those laws were prescribed; and this was really the reason or cause of most of the changes in this respect that were made by them. We ought not to impute either to them or to the legislature which adopted what they did an intention to change the laws themselves as expounded by the courts, unless such intention is clear from the language employed. And since they well knew that, according to the adjudications of this court, the decision of a circuit judge upon an application for a change of *venue* was not revisable here, and since, also, it would have been very easy, if it was their purpose to change the law in this respect, to do so in plain terms, we may be certain, if such was their intention, that it would have been expressed in language that would leave nothing to construction or in doubt.

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Whether such alteration was effected by the Code, was the question brought before this court in 1856, in *Ex parte Banks* (28 Ala. 28); a case which, on account of peculiar circumstances, excited much interest and enlisted eminent professional ability on behalf of the applicant, who had the sympathy of all the judges on his side. After an able discussion of the subject at the bar, and in the opinions of the judges, it was decided (RICE, C. J., dissenting), that the language of the Code, though differing from, was only the equivalent of what was expressed in the former acts, and that no such change was made. WALKER, J., in closing his opinion, said: "The decisions of the courts of our sister States, in reference to the change of *venue*, are generally based upon statutes. For that reason they are not referred to as authorities in this opinion; but none of them are in conflict with the conclusion obtained."

The decision in *Ex parte Banks*, made in 1856, was acquiesced in as correct by the profession and the legislature, without any attempt to change it, for a space of thirteen years. Then in 1869 the same question, whether the decision of the circuit court upon a motion to change the *venue* in a cause was revisable in an appellate court, was presented again in *Ex parte Chase* (43 Ala. 303), and was decided, as heretofore mentioned, in the affirmative, by Judges PETERS and SAFFOLD, and the decision in *Ex parte Banks* declared to be overruled, PECK, C. J., dissenting. PETERS, J., who delivered the opinion of the majority of the court, suffered himself to be carried off into a discussion of the question whether a defendant in a criminal cause is entitled to a fair trial by an impartial jury, which nobody ever disputed; whereas the true question was, what is the proper legal method of obtaining such a trial? And in the course of his remarks, he does not directly comment at all on the prior decisions of this court; although it seems from the tenor of his opinion, that he considered them to be in palpable violation of the Constitution.

The right guaranteed by the Constitution to a person under indictment, — a right of inestimable value to one who is innocent (and it is for the benefit and protection of such that all like provisions are made), — is that he shall have "A speedy public trial by an impartial jury of *the county or district in which the crime was committed*." This does not secure to the accused as a *constitutional right*, a trial by jury in any other county or district. Indeed, where there is no special prejudice against him, that county or district in which the crime was committed, and a speedy public trial in it, are ordinarily the best means of securing the acquittal of one who is falsely accused. For there, generally, are the witnesses and evidence needed at the trial, and a local knowledge of facts and circum-

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stances, which, as truth is necessarily harmonious with all facts, directly or indirectly aid to vindicate the innocent.

The proper usual methods of procuring an impartial jury are by having men of intelligence and integrity summoned to compose it, and challenges for cause, and a reasonable number of peremptory challenges allowed to the accused, to prevent unfriendly persons from being put upon it; in which particulars the law has made liberal provisions for his protection against unjust accusations.

If these be not sufficient, and on account of local animosities, or other causes, a fair trial cannot be had in the county in which the crime was committed, the cause should be transferred to and tried in some other county, free from the like exception. Whether a change of *venue* is necessary to obtain a fair trial by an impartial jury is not a question of law, but of fact. And a circuit judge on the spot, in "view of all the circumstances," and having knowledge of persons, facts, and influences, is much better qualified than the supreme court at a distance, with only ingeniously written *ex parte* affidavits before it, to determine the fact whether or not it is true, that the defendant cannot have a fair trial by an impartial jury in the county in which he is indicted. As a jury is by law held to be better qualified than even the supreme court, to ascertain what facts are established by the evidence in a cause, so a circuit judge, in "view of all the circumstances," must be better qualified than it, to determine a matter of fact of the sort under consideration; and we think it does not often happen that an official occupying that honorable position has so little humanity as to insist on the trial in his court, for a high crime, of one that he believes cannot there have justice done to him.

It surely cannot be regarded by a lawyer as an extraordinary thing, that a circuit judge should have authority to decide definitively a merely preliminary matter, like a motion for a change of *venue*. Not only has such authority been always exercised in our midst, by the judges of the inferior courts of the United States, but no appeal is allowed in criminal cases from any rulings made or sentences pronounced therein, by such judges. Yet no court has ever considered this a denial of a constitutional or "fundamental right."

It is well known, that many times the chief object of a motion to change *venue* is to have the trial transferred to a place distant from that in which the witnesses for the prosecution reside, for the distinct purpose of being rid of their evidence. The State does not advance to witnesses in its behalf the expenses of their attendance to testify. They are often poor and unable to go to a distance for that purpose; and the consequence frequently is, that they do not go to the place of trial,

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and the criminal, therefore, escapes unpunished. A judge who should see that this was the object of an application for a change of *venue* would fail in his duty to the public if he aided in making the scheme successful, as he would also fail in his duty to the same public, if, on the other hand, he did not see to it that no innocent person should in his court be sacrificed to the malevolence either of individuals or of a community.

It is with much regret that we find ourselves compelled to make a decision that effects a change in the recent practice of the courts on this subject. But no rights of property are involved in the matter, and the subversion of the long established and correct rule, and substitution of a contrary one, so tends to the obstruction of the course of justice, and causes such delays in the proper administration of the laws, as to impose upon us the duty to reestablish that correct rule, and to hold that the decision of the circuit courts on applications for change of *venue* are not revisable in this court.

The communications of deceased were dying declarations, and as such admissible in evidence against the prisoner. The objections to them were to the admission of all he said. If any portion of the communications was objectionable for a particular reason, the objection to it should have been specifically made, and not the whole of them excluded.

There was no error in admitting both the written statement taken down by one witness, and the declarations made in the hearing of another. This is not a case, like that of contract, in which oral evidence is inadmissible because there was a writing, setting forth the agreement of the parties. The proof was only cumulative, or that of different witnesses as to the dying declarations of the deceased, to which there can be assigned no valid legal objection.

Judgment of the court below is affirmed.

Sellers v. The State.

Indictment for Burglary.

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1. *Empanelling jury; what ruling as to, not erroneous.* — A defendant on trial for a felony not capital who refuses to pass on jurors accepted by the State and put upon him in a body, and demands the empanelling of a jury as in capital cases, cannot complain on error that this was denied him, when it appears that the court allowed him opportunity, of which he failed to avail himself, to examine each juror separately as to qualifications and cause of challenge.

2. *Practice.* — It is not error for the court to inform counsel while addressing the jury that the court will charge the law to be different from what counsel states it.

3. *Indictment; when date of filing of, may be looked to.* — Where the defence set up is that the transaction, constituting the offence as charged, was another and different transaction from that proved, which it was contended had occurred subsequent

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to the finding of the indictment, it is not erroneous to instruct the jury that while the indictment is not evidence, the date of the filing indorsed on it may be looked to as evidence.

APPEAL from Circuit Court of Wilcox.

Tried before Hon. J. K. HENRY.

The appellant was convicted of burglary in the dwelling-house of Benjamin Newbery. When the case was called for trial both parties having announced ready, the court directed defendant to go to trial before one of the regular juries, which before that had been regularly examined, found qualified, and duly sworn for the week. The solicitor challenged two of the panel, and announced his satisfaction with the remainder. The defendant was then directed to pass upon the remaining jurors, but objected, "claiming the right to have the jury empanelled as in capital cases, by an examination of, and passing on, each one separately." The court refused to exclude the jury from the box, but informed defendant that he might examine each juror in the box separately as to his qualifications or any cause of challenge. Defendant refused to do so, and said, "that without waiving any right which he had, he was content with the jurors. Two other jurors were called and accepted, after examination." It does not appear that the defendant excepted to this ruling of the court, although it was urged here as erroneous.

The evidence as to the date when the offence was committed was not very definite. No witness stated directly that the burglary was committed before the finding of the indictment, and none were examined who went before the grand jury. One witness said that the offence was committed in the spring of 1872. There was evidence that defendant confessed "he did go into the house," but did not give the date. Another witness testified that the burglary was committed early in the spring of 1872, about April or May, but in which of these months he could not say.

The defendant's counsel argued to the jury, among other things, that all the allegations of the indictment must be proved precisely as laid, and that circumstantial evidence was not sufficient to prove that the offence charged was the same as that about which the witnesses spoke, or that it was committed before the indictment was found. Here the court interrupted counsel and stated that it would charge the law to be different from that asserted by defendant's counsel; to which remark the defendant excepted. The court charged the jury "that circumstantial evidence was legal evidence, and as good as any to prove when the offence was committed, provided it satisfied their minds beyond a reasonable doubt; that the indictment was not evidence, but that the date when the indictment was

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filed could be looked to as evidence in the case." To the giving of this charge the defendant duly excepted. The indictment was indorsed, "Filed and returned in open court, May 3d, 1872."

JOHN McCASKILL, for appellant.

JOHN W. A. SANFORD, Attorney General, *contra*.

JUDGE, J. — 1. The jury in this case seems to have been regularly empanelled and properly sworn, and the defendant was not denied the legal right to examine each juror to ascertain whether or not he was obnoxious to a challenge for cause. We can see no error in the ruling of the court upon this question.

2. The counsel for the defendant, while arguing the case before the jury, was told by the court that it would charge the law to be different from what counsel stated it to be, as to the effect of circumstantial evidence. The court committed no error in this interruption of counsel; nor did the court err, in its charge to the jury, as to the force and effect of circumstantial evidence; nor in telling the jury that the indictment was no evidence against the defendant, but that they might look to the date of the filing of the indictment as evidence. This it was proper for the jury to do, upon the question made by counsel for the defence, that the transaction constituting the offence as charged in the indictment was another and a different transaction from that proved by the witnesses, which it was contended had occurred subsequent to the finding of the indictment.

We can see no error in the record, and the judgment is affirmed.

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Indictment for Larceny from Warehouse.

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1. *Opinion of witness; what, inadmissible.* — A witness who was very wakeful and saw defendant go to bed, in the same room in which witness slept that night, and found him there next morning, cannot give his opinion "that the defendant could not have left the room without his knowing it," as proof to establish an *alibi* for the defendant.

2. *Evidence; what irrelevant on trial of larceny.* — On a trial for larceny, proof of the "bad character" of the employees and others about the warehouse, from which the property was stolen, who are in nowise connected with the case either as defendants or witnesses, and not charged with the theft, is wholly foreign to the issue and utterly inadmissible.

3. *Case reaffirmed.* — *Hagan v. State*, at present term, reaffirmed as to what constitutes a "warehouse" within the meaning of section 3707 of Revised Code.

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APPEAL from Circuit Court of Wilcox.

Tried before Hon. JOHN K. HENRY.

The appellants were convicted for larceny from a warehouse, under § 3707 of the Revised Code. On the trial one of them sought to establish an *alibi*. A witness for the defence testified that he was very wakeful; that he saw Bennett go to bed in the same room in which witness slept that night and found him there next morning when he awoke; that there were two doors to the room; that these were the only openings, and that witness slept near one of them. The defence then "offered to show to the jury, that in the opinion of this witness defendant could not have left, or got out of the house, without witness' knowing it." The court refused this offer, and "would not allow said evidence as to the witness' opinion to go to the jury, and defendants duly excepted." In the further progress of the trial the defendants offered to show that the employees at the warehouse, from which the larceny was committed, but who were not witnesses, or in any way connected with the case, or charged with the theft, "were of bad character." The court refused to allow this proof to be made, and the defendants duly excepted.

The evidence showed that the building, from which the cotton was stolen, was a covered structure, used for storing cotton bales. One side and end were planked up, and the other left open so that wagons could drive under the shed thus formed to load and unload. The structure, together with two acres of land connected therewith, was inclosed by a close plank fence nine feet high, the gates of which were kept locked. The court charged the jury if they believed that such was the character of the place from which the cotton was stolen, and that it was used for storing cotton, it was a "warehouse" within the meaning of the statute. The defendants excepted to the giving of this charge. The various rulings to which exceptions were reserved are now assigned as error.

JOHN McCASKILL, for appellants. — The witness' opinion, on facts already given the jury, should have been allowed for what it was worth. 29 Ala. 244; 19 Ohio, 302.

JOHN W. A. SANFORD, Attorney General, with whom was J. Y. KILPATRICK, *contra*. — The court did not err in refusing to permit the witness to give his opinion. He was not an expert. 8 Watts, 406; 52 Missouri, 221; *Whittier v. Town of New Hampshire*, Am. Law Register, vol. 14, 704.

BRICKELL, C. J. — It is peculiarly the province of the jury to draw deductions or inferences from facts, and it is sel-

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dom, if ever, permissible for a witness, not an expert, to give his mere opinion — an opinion which is a mere inference from facts — when the jury are equally competent as to such matter to form the opinion or deduce the conclusion sought from the facts. The witness in this case was not an expert. The matter about which his opinion was sought was as to an inference from facts, which it required no peculiar skill, or particular fitness or experience, to solve. Whether the event could have happened, as to the occurrence of which the witness' opinion was desired, was a matter of which the jury, guided by their observation and experience, and the circumstances of the particular case, were the best and only judges. The question asked went to the merits of the whole case. There is no appreciable difference between the opinion asked for, and a request for the witness' opinion as to whether the *alibi* was proved. The question called for an opinion which was clearly inadmissible, and the court rightly refused to permit the witness to answer. *State v. Garvey*, 11 Minn. 163; *Don Crane & Wife v. Town of Northfield*, 33 Vermont, 124; *Comm. v. Cooley*, 6 Gray, 355; *Pelamourges v. Clark*, 9 Iowa, 16; *Walker v. Walker*, 34 Ala. 473.

II. The court did not err in refusing to allow the defendants to show the "bad character" of those in charge of the yard and press. It is expressly stated that they were not witnesses or charged with the theft, or otherwise connected with the case. Such an issue was wholly foreign to that on trial. The proof offered would have needlessly incumbered the case, served to distract the attention of the jury from the main points involved, and have uselessly wasted the public time. It would be a dangerous precedent to allow a defendant to take up the time of the court in showing that parties living near the scene of the crime, or who had an opportunity to commit it, were of bad character; there often would be no end to the inquiries thus submitted to the jury, and the trial of criminal cases could thereby be protracted, sometimes beyond the term during which the court is authorized to sit. The evidence was inadmissible for another reason. It did not show whether the bad character was as to truth and veracity, or for honesty. If the proposed evidence was as to the character for *truth and veracity*, it would clearly be inadmissible, where the parties referred to were not witnesses or otherwise connected with the case, even if we could hold that evidence of bad character for honesty was admissible.

III. There is nothing in the error assigned as to the charge of the court. Under the evidence in this case the structure mentioned was a "warehouse," within the meaning of § 3707 of the Revised Code. *Hagan et al v. State*, in MS. Besides

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this, the exception is a mere general exception to the entire charge of the court not specifying the objectionable parts. In such cases, if any proposition in the charge is correct, the exception is not available.

The judgment of the court below is affirmed.

Hagan *et al* v. The State.

Indictment for Larceny under Section 3707 of Revised Code.

1. "Warehouse;" what is, within meaning of § 3707 of Rev. Code. — A covered structure, used for storing cotton bales, one side and end of which were planked up, and the others left open so that wagons could drive under to load and unload, which, together with two acres of land connected with it, was inclosed by a plank fence nine feet high, the gates of which were kept locked, constitutes a "warehouse," within the meaning of section 3707 of the Revised Code.

2. Same; presumption as to legislative meaning. — In construing the word "warehouse," as used in a penal statute punishing larceny from it and other like buildings, the legislature must be presumed to have meant such "warehouses" as were familiar to, and in common use by, the people.

APPEAL from Circuit Court of Wilcox.

Tried before Hon. JOHN K. HENRY.

The facts are sufficiently stated in the opinion.

R. GAILLIARD, for appellants. — The word "warehouse" had a technical meaning before our statute was adopted. *Regina v. Hill*, 2 Moody & R. 458; Foster's Crown Cases, 77; 1 Leach C. C. 287. By the term "warehouse" "places where goods are deposited until sent away, without any view to sale, are not included." In 39 Ala. 679, under a charge for larceny from a dwelling-house, a stealing of clothes from the edge of a piazza was held not to constitute the offence. The word "dwelling-house" is held to have the same meaning in the statute against burglary as against larceny. *Ex parte Vincent*, 26 Ala. 145. The structure, from which the cotton was taken, was certainly not a house. Burglary could not be committed by breaking into it. Not possessing the characteristics of a house at all, it cannot be a "warehouse." Certainly, a stealing from such a place as this is not as much within the spirit of the statute as was the stealing from the piazza of the "dwelling-house" (39 Ala. 679); and the latter case is therefore an authority against the charge given by the court.

JOHN W. A. SANFORD, Attorney General, with whom was JOHN Y. KILPATRICK, *contra*. — The place described was a warehouse within the meaning of the statute. *Owen v. Boyle*,

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22 Maine, 47 ; *Allen v. The State*, 10 Ohio State, 287 ; *Wilson v. The State*, 24 Conn. 57. It is submitted that burglary could be committed in this structure. The openings are *necessary* to the proper handling and storing of cotton.

MANNING, J.— The appellants in this cause were found guilty of the larceny of three bales of cotton, of value exceeding \$180, “in and from the warehouse” of James C. Wilson, in Wilcox county. And the principal question presented is, whether the place from which the cotton was taken is a “warehouse,” within the meaning of § 3707 of the Revised Code.

That section is as follows: “Any person who steals any personal property from any building on fire, or which was removed in consequence of an alarm of fire, or from the person of another, or who commits the crime of larceny in any dwelling-house, storehouse, warehouse, shop, or steamboat, must, on conviction, if the property stolen exceeds fifty dollars in value, be punished as if he were guilty of grand larceny.”

The description of the place supposed to be a warehouse is that it was “a cotton yard, and a covered and inclosed cotton shed, owned and kept by said Wilson,” who was warehouse keeper at Prairie Bluff, in Wilcox county. “In said cotton yard was a covered cotton shed, used by said Wilson for the purpose of storing cotton bales under for the public.” The cotton yard was about two acres in area, and “was inclosed all around with a fence of plank nine feet high.” The shed was about 100 yards long and 30 yards wide. The sides of it, in the yard and one end, were entirely open from the ground to the roof, so that wagons drawn by mules might pass under and out from said shed in loading and unloading, but the whole was inclosed by the fence above named. The said shed was supported by posts, and the fence of plank which inclosed said yard, when it reached the line of posts in the rear of said shed, was continued along the same, by plank being nailed to the back or rear posts supporting the shed at one end ; thus leaving one whole entire side, and one end of said shed, entirely open from the ground to the roof, but which was inclosed by the fence aforesaid ; the fence was continuous, inclosing the entire shed within the area of said yard. The gates of said yard were kept locked, and were locked at the time the cotton was stolen,” &c.

This is a pretty good general description of the warehouses kept at river landings, and in cities of this State for the storage of cotton in bales ; except that in the cities, and at some river landings, the inclosure of the yard is ordinarily a brick wall, and the sheds often cover a larger portion of the area of the yard.

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This manner of constructing warehouses for the storage of cotton, at places where it is accumulated in large quantities, results from the fact that this valuable commodity being bulky is hauled to and from the places of deposit, in large wagons or drays, and has frequently to be removed, in order to be sampled, weighed, and examined; or to enable the cotton of others stored in the same place to be so, and to be marked and shipped. A large uncovered court or area, and one or more covered structures with one open side, so that the cotton may be easily got at and removed, are required for the convenient handling of it. This is well understood by everybody. Therefore the walls, whether of brick and mortar, or of wooden planks, which inclose these areas and sheds, are quite a different thing from the fences that surround dwelling-houses, and the out-houses, curtilage, &c., about them, to which they are likened in the argument. In the former case, the inclosure is a part of the entire structure; while in the latter it is wholly independent of, and merely an outer protection for, the houses and grounds within, and is erected generally to keep out domestic animals and fowls.

It has been ingeniously argued for the appellant, that such an inclosure as the cotton warehouse under consideration is not a place in which burglary can be committed, and that the word "warehouse" is used in § 3707 in the same sense as in § 3695, relating to that crime.

Whether the former proposition is true or not, we need not now inquire. But a cardinal rule of ascertaining the meaning of words to be interpreted is to consider the subject-matter about which they are employed, and the other words used in connection with them. Burglary is not committed without a breaking into the building which is the subject of it. Hence if a man find a dwelling-house open in the night-time, and enter and steal from it, he does not commit burglary, because it was already open; and so of any other open building. But that is no reason why the stealing from an open dwelling-house, or some other accessible structure, should not be punished as a worse offence than stealing from the outer premises. It is made punishable as such by § 3707.

By this section also the stealing from a steamboat is put upon the same level as the stealing from a warehouse. The cargo of a river steamboat is carried mainly upon the deck, which is entirely uninclosed. There would be no burglary committed by one going upon such deck in the night-time for a felonious purpose. Yet a stealing from it is, by this section, distinguished from, and made more severely punishable than stealing from an open yard.

We are of opinion that the legislature must have had in con-

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templation, when making this enactment, such warehouses as they and our people are familiar with throughout the State, and that the structure described in this cause was a "warehouse" within the meaning of that word in that enactment.

We do not agree with counsel for appellant in the construction of the charge of the court, that the judge therein assumed it to be proved that the property alleged to have been stolen was of a value exceeding \$100. The question of value seems to have been sufficiently referred to the jury. And the entire charge refers to the second count in the indictment, averring that the larceny was from a warehouse.

The judgment of the circuit court is affirmed.

Walker v. The State.

Indictment for Burglary.

Burglary; what constitutes. — Going down a chimney into a house, used for storing cotton, with the intent to steal, and getting out through a window by breaking the inside fastening, is a sufficient "breaking into and entering" to constitute burglary as defined by section 3695 of the Revised Code.

APPEAL from Circuit Court of Wilcox.

Tried before Hon. JOHN K. HENRY.

The opinion states the case.

HOWARD & HOWARD, for appellant. — To constitute the statutory burglary, Rev. Code, § 3695, there must first be a breaking *before* entering — a "breaking" *into* and then an entry. 1 Hale's P. C. 554; 1 Bish. Crim. Law, §§ 250-1. The statute (12 Anne) making *breaking out* of a house burglary is not law here. 19 Ala. 814. None of the cases hold that a person can be convicted of burglary for entering an opening, which is not a *necessary* opening. A chimney is a necessary opening to a dwelling, but not to a cotton-house; hence *Donohoo v. State*, does not apply.

JOHN W. A. SANFORD, Attorney General, *contra*. — The present case cannot be distinguished from that of *Donohoo v. The State*, 36 Ala. 281.

JUDGE, J. — The indictment in this case was for burglary, and charged the defendant with breaking into and entering the cotton-house of Archie Nicholson. The evidence tended to show that the defendant entered the house by going down the chimney, and that after thus entering, he got out of the

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house through a window, by breaking the fastening of the window from the inside of the house.

It is ingeniously contended by counsel for the defendant, that to constitute the crime of burglary, under section 3695 of the Revised Code, there should be a *breaking into and entering* one of the houses described in said section; and that as the evidence in this case showed, that the defendant *entered and broke out of* the house, he was not guilty of the offence charged.

By the common law, descending the chimney of a house is an actual breaking; as much so in legal effect as would be the forcible breaking into a house by any other means. 3 Green. Ev. § 76. And such was recognized to be the law by this court in *Donohoo v. The State*, 36 Ala. 281.

In that case the defendant got into and attempted to descend the chimney of a storehouse, but was arrested in his descent, when near the arch of the fireplace, by the smallness of the aperture; and he became so tight and fast that he could not be pulled out, either at the top of the chimney or at the fireplace below, and the chimney had to be pulled down to extricate him. Although the defendant did not enter any room of the house, he was adjudged to have been guilty of burglary. The court held that a chimney is a necessary opening, and needs protection, as a part of the dwelling-house, it being as much closed as the nature of things will admit; and this decision seems to have been well fortified by the numerous authorities cited in the opinion of the court.

There is no error in the record, and the judgment of the circuit court is affirmed.

Ex parte Susan Birchfield.

Application for Prohibition.

Common law offence of keeping bawdy-house; not repealed. — Section 3630 of the Revised Code upon *vagrancy*, which makes amenable to its provisions "any person who is a common prostitute, or the keeper of a house of prostitution, and has no honest means of employment," &c., does not repeal the common law offence of keeping a bawdy-house; and the punishment for the latter offence not being "particularly specified" in the Revised Code, the court, on conviction, may properly award the punishment authorized by section 3754 of the Revised Code.

THIS was an application for a writ of prohibition to the judge of the circuit court of Madison. The facts upon which it was based are fully set forth in the opinion.

DAVIS & JONES, for the petitioner. — Section 3630 of Rev. Code fixes the punishment of prostitutes, &c., at not less than

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ten, nor more than fifty dollars for the first offence. The statute fixing punishment for the offence, it cannot be punished as a common law offence. Rev. Code, § 3754; 1 Arch. Crim. Pleading, marg. p. 2. The court, therefore, was without jurisdiction to impose the sentence it did, and prohibition will lie. 25 Ala. 94; 34 Ala. 455.

JOHN W. A. SANFORD, Attorney General, *contra*. — Being a common prostitute is only one element of the offence of *vagrancy*. Section 3630 of the Code does not define or punish the keeping of a “bawdy-house.” The whole purpose of the statute is to prevent *vagrancy*. Merely being a prostitute will not constitute *vagrancy*; to have this effect there must be coupled with it the further fact that she had “no honest employment,” &c. This statute, therefore, does not repeal the common law offence of keeping a “bawdy-house.” *Jennings v. Commonwealth*, 17 Pick. 82.

MANNING, J. — The petitioner was indicted and found guilty of keeping a house of ill-fame, or bawdy-house, for which the jury assessed against her a fine of two hundred dollars; and this and the costs of the prosecution not being paid, the court sentenced her to hard labor for over four hundred days.

In doing this, it is insisted that the court exceeded its jurisdiction; that the penalty for this offence is prescribed by section 3630 of the Revised Code, and is much lighter than the penalty imposed on her; and application is thereupon made for a writ of prohibition to the judge of the court in which she was tried, to prevent the execution of the sentence against her.

The prosecution was for an offence punishable by the common law, and was indictable under section 3754 of the Revised Code, unless the punishment therefor is “particularly specified” in the Code. The only section in which this is supposed to be done is § 3630, headed “*vagrancy*.”

In this it is enacted, that a person who is a common prostitute, or the keeper of a house of prostitution, *and has no honest employment whereby to maintain herself*, must, on conviction, for the first offence be fined not less than ten, nor more than fifty dollars. This evidently does not prohibit a prosecution for the common law offence of keeping a bawdy-house, or house of prostitution. If it did, then a person who was in good circumstances, and had money to lend, and was engaged in some “honest employment” whereby he or she could be maintained, and was, therefore, the more clearly inexcusable for being con-

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cerned in such an evil business, might keep a house of ill-fame with impunity. We cannot give to this provision of the Code, an interpretation that would lead to such a conclusion.

Under section 3754 of the Revised Code, a fine not exceeding five hundred dollars may be imposed upon one convicted of the offence with which the indictment charges this petitioner; and if the fine and costs be not paid, imprisonment may be substituted by the court, according to section 3760 of the Revised Code.

The application for a writ of prohibition is denied.

Adams v. The State.

Indictment for Receiving Stolen Property.

1. *Charge to jury; what should be refused.* — The court never errs in refusing a charge requiring explanation, or which has a tendency to mislead or confuse the jury, *e. g.*, as where the court in its charge enumerates several facts connected with a criminal transaction, upon consideration of which the jury might pronounce a verdict of guilt, and the defendant singles out one of these facts, and requests a charge that "from this fact alone" guilt cannot be inferred.

2. *Receiving stolen goods; what may authorize inference of guilt.* — Where a man engaged in trade is found in possession of stolen goods under suspicious circumstances, and declares that he knows, or has the means of ascertaining, the person from whom he received them, out of the ordinary course of business, his failure to take any steps to point out such person is a potent fact from which the jury may well draw the inference of guilt.

APPEAL from the Circuit Court of Lowndes.

Tried before Hon. J. Q. SMITH.

The appellant Adams was indicted and convicted for receiving a gin-band, knowing it had been stolen.

On the trial but two witnesses were introduced, and both of these for the prosecution. The owner of the gin-band, one Buckhault, testified that it was stolen from him about the first of April, and that in the latter part of the same month, learning from one Barganier that the band was in the defendant's possession, witness and Barganier went to defendant's house, which was distant some five miles from the place where the gin-band was stolen. Defendant, "who was or had been keeping a store," was asked "if he had a gin-band there." He replied that "he had one, which some person brought to his house one night, while he was sick; that this person, who was unknown to defendant, said he had brought it to sell and that the price was seven dollars, which he would take out in molasses and other articles; that witness promised to get these articles when he went to Greenville, and the person threw the band across the fence, where it remained until morning; that as soon as he saw the gin-band he became satisfied that it was

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stolen." These witnesses further testified that in this same conversation defendant told Buckhault, as he was taking the band home, "if the matter was kept quiet they would be sure to find out who this person was, as he would be certain to come back for his pay the next Sunday week." Buckhault told defendant he would give him until that time to find out, and that he must come to him, Buckhault, if he did not call on defendant, in case any discoveries were made. Defendant promised to do this, but never came to Buckhault, as he promised, or gave him any information on the subject. Barganier corroborated Buckhault's testimony, and stated further, that while defendant was riding with him in the neighborhood, several days before Buckhault recovered his property, he voluntarily informed him that he had lately taken in a gin-band. The foregoing was substantially all the evidence.

The court gave a general charge to the jury, the substance of which is set out in the opinion. The defendant requested the following written charge: "That because defendant has not proved to the jury that he has made efforts to detect the thief, who stole the gin-band, is not such evidence as will prove the defendant's guilt, and the jury cannot infer the defendant's guilt from that circumstance alone." This charge was refused, and defendant excepted.

R. M. WILLIAMSON, for appellant.

JOHN W. A. SANFORD, Attorney General, *contra*.

BRICKELL, C. J. — The court, in its general charge, referred to and enumerated several facts the evidence tended to prove, and instructed the jury in effect they could look to these facts, and, if they were deemed sufficient, on them pronounce a verdict of guilty. No exception was reserved to this charge, but the appellant singling out one of these facts requested the court to charge, that from it alone guilt could not be inferred. Admitting it to be true, as a legal proposition, that from this fact alone the guilt of the defendant was not inferable, the right of a defendant thus to sever the facts, and request the court to charge that the fact, dissociated from other facts in evidence, is not sufficient to authorize a conviction, cannot be admitted. If it could be, he would have a right to ask a charge as to each particular fact, that of itself and by itself, or in the language of the bill of exceptions, *alone*, it was insufficient to convict. Without further explanation, the jury would be confused, and probably misled into the supposition, that as each fact was thus declared insufficient to authorize a conviction, the whole combined was not sufficient. To avoid

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this, an explanatory charge from the court would be necessary. The court never errs in refusing a charge requiring explanation, or which has a tendency to mislead or confuse the jury. 1 Brick. Dig. 339, §§ 60-61.

Beside, it cannot be admitted as a legal proposition that in all cases, and under all circumstances, the failure of a defendant, charged with receiving stolen goods, to prove that he made efforts to detect the thief, may not be sufficient to authorize a conviction. The guilty knowledge, which is an essential element of the offence, is rarely the subject of direct and positive proof. It is inferred from circumstances that are as various as the shapes crime assumes. The failure of a man engaged in trade, who is found under suspicious circumstances in possession of stolen goods, who declares that he knows, or has the means of ascertaining the person from whom he received them, and who transferred to him possession in a manner out of the ordinary course of business, to take any steps to detect such person, by which we suppose the bill of exceptions intends to produce or point him out, would be a potent fact from which a jury could reasonably infer guilt. No charge ought to be given, which would deny to them the right to declare what was the proper inference from the failure. It is the province of the jury to draw the inferences from the facts in evidence, and it must be clear and indisputable that no reasonable inference can be drawn from them, before the court should deny to them the right of determining the inferences of which the facts are capable. The judgment is affirmed.

Ex parte Diggs.

Application for Mandamus.

1. *Penal enactment; what is.*—An enactment providing for suspension from office is a penal statute, and will not be enlarged in its scope by construction.

2. *Act to remove solicitors, &c.; to what applies.*—The act of March 2, 1875, requiring the suspension of a county solicitor against whom an indictment is pending, has no application to indictments for offences committed before its passage. If it did, it would be violative of the constitutional provision against *ex post facto* laws.

3. *Mandamus; when proper remedy.*—*Mandamus* allowed in this case to restore a county solicitor to office, who has been improperly suspended upon indictment found against him for an offence committed after the passage of the act.

APPLICATION for *mandamus*. The facts are given in the opinion.

REID & MAY, for petitioner. — The act cannot be construed retrospectively. 19 Ala. 707; 13 Ark. 729; 2 Scam. 223; 1

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Cal. 55; 15 Ill. 20; 7 John. 477; 33 Maine, 333; 1 Denio, 128; 21 Conn. If it is retrospective in its operation, it is utterly void. The act is penal; it provides for removal from office. 7 Porter, 294. It must therefore be strictly construed. *Rex v. Handy*, 4 Term, 666; 1 Bish. Crim. Law, § 110. The legislature, unless the Constitution expressly authorizes, has no power to change, add to, or modify the qualifications for holding office declared by the fundamental law. Cooley Con. Lim. 64. *Thomas v. Owens*, 4 Mo. 189; *Brown v. Commonwealth*, 1 Bush (Ky.), 1; *Lowe v. Commonwealth*, 3 Metcalf (Ky.), 237. The legislature may change salaries, unless expressly prohibited, because it fixes them in the first instance. If the Constitution fixed the pay, as well as the qualifications, the legislature would have no power over either. 65 N. C. 603. The indictment is not evidence of guilt, and the legislature cannot make it operate as proof of guilt.

MORGAN, LAPSLEY & NELSON, *contra*. — The act merely provides a suspension from the discharge of the duties of the office, without amotion from office. This power resides in the legislature, even where the office is created by the Constitution, unless it forbids its exercise by direct prohibition, or by indirection, as where the Constitution provides how the officer shall be removed. *Brodie v. Campbell*, 17 Cal. 11. The suspension provided by the act is not a punishment, nor is it a superadded qualification; it is merely stating a condition upon which the solicitor is prevented from discharging the duties of the office. *Calder v. Bull*, 3 Dallas, 386. The whole legislative power is vested in the legislature. *Dorman v. The State*, 33 Ala. The courts always had power to suspend from practice attorneys who have become unfit by reason of crime. It is offensive to public morals, and detrimental to the administration of justice, to intrust to a man indicted for crime the administration of the criminal laws. The legislature has the right to prevent this. The act simply makes *mandatory* upon the court, what it always had the power to do, to suspend from practice a person who is shown to be unfit. The law is not *ex post facto*, and public policy demands that it receive a liberal construction. 4 Conn. 221.

MANNING, J. — Petitioner was elected in November, 1872, solicitor for the county of Dallas, for the term of four years prescribed by the Constitution, and was duly qualified and inducted into office; and at the Spring term of the court, 1873, he was indicted for accepting a bribe, of which he was afterwards convicted. The sentence against him was reversed for error in the proceedings, by the supreme court, and the cause

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remanded ; after which, upon defendant's motion for a change of *venue*, it was transferred to the circuit court of Hale county, where it is still pending.

An act (No. 155) approved March 2, 1875, enacts : " That when it shall be made known to any circuit or city court that an indictment or indictments are pending against the person who is acting as solicitor of the county in which the court is held, the court must make an order suspending such solicitor, and the solicitor so suspended shall not act as solicitor until such order of suspension shall be set aside."

In May last, notice in writing was filed in the circuit court of Dallas county, by attorneys of that court, and a motion made that defendant be suspended from office as solicitor, on the allegations that an indictment for bribery had been found against him by a grand jury, in the criminal court of said county, and that the prosecution thereupon was still pending in the circuit court of Hale county, to which it had been transferred on motion of defendant. And on the hearing, the defendant, James S. Diggs, was suspended from office ; and under section 2 of the act another attorney was appointed to perform the duties of solicitor, during the continuance of such suspension.

Application is made to us for a *mandamus* to set aside these orders, and reinstate defendant Diggs in office.

The order of suspension seems to be founded on the statute only. We should not interfere with the lawful authority of the court, duly exercised, in suspending from practice before it a person unfit and unworthy to be allowed the privileges of an attorney or solicitor therein. But the proceedings in this cause seem to have been founded on the act alone ; and we are therefore required to decide whether it sustains the action of the court.

Suspension from office is a deprivation of office for the time. And when this is effected through the operation of a statute prescribing such suspension as the consequence of some act or event, the statute is a penal one, and, therefore not to be enlarged in its scope by construction. There is nothing in the language of this enactment requiring us to make it retroactive ; and we should violate a well established rule for the interpretation of statutes, if we did not hold that this was prospective only in its operation, and therefore did not sustain the action of the court in this cause.

If this act provided that upon conviction of the crime of bribery, for such an offence committed before the enactment of the law, the offender, in addition to the penalty prescribed by existing laws, should be suspended from any office of which he was incumbent (supposing this not to be already the law),

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there can be no doubt that this would be void as an "*ex post facto* law." Is it any the less an infraction of the same constitutional provision to enact that if a man be then indicted, instead of being afterwards convicted for an offence previously committed, he shall be suspended from office? It seems to us that while the other law would in ethics be less objectionable than this, they are equally obnoxious to the constitutional provision against *ex post facto* laws.

It is, therefore, ordered that a rule *nisi* be issued to the Honorable George H. Craig, — judge of the first judicial circuit of the State of Alabama, — requiring him to appear and show cause in this court on Thursday, the 19th day of August instant, why a peremptory writ of *mandamus* should not issue as prayed for.

Smith v. The State.

Indictment for Gaming.

1. *Election ; when prosecutor will be compelled to make.* — Although an indictment is so framed as not to designate the particular transaction, or act to which it relates, or contains several counts charging the offence to have been committed in different ways, it includes but one offence; and if the State offers evidence of more than one, the defendant may compel the prosecutor to elect on which he will proceed.

2. *Same.* — Election is compelled in such cases to prevent prejudice to the defendant by bringing in evidence of guilt of crimes for which he is not really indicted, and to avoid bolstering up a conviction on the offence charged by proof of other and different offences.

3. *Same.* — The principle has no application to a case where evidence is given of but a single well-defined criminal act done at a particular place, although such place, according to the testimony of different witnesses, may be stamped with the characteristics of one or more of the places at which gaming is prohibited.

4. "*Public place ;*" *what is within meaning of section 3620 of the Revised Code.* — Any house to which all who wish can go night or day and indulge in gaming, is a "public place," within the meaning of the statute. The fact that it is used as a bedroom, kept locked so that no one can enter but by permission, and after surveillance from the inside, and otherwise invested with privacy, will not prevent the characteristic of a "public place" attaching to it, if it is frequented by all who wish to engage in the sports which the occupant there carries on, and for the indulgence of which he furnishes the appliances.

APPEAL from the Circuit Court of Lee.

Tried before Hon. J. E. COBB.

The appellant, A. J. Smith, was indicted and convicted for gaming, under an indictment based on § 3620 of the Revised Code, and pursuing the statutory form.

The room in which the playing took place was back of a bar room, on the same floor and under the same roof with it. The front room was used by one Elliott, for the sale of spirituous liquors. There was no connection between it and the back, there being a room in between which did not communicate with

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either the rear or front room. The only means of communication between the room in which the playing occurred and the bar-room was by a passage on the side of the rooms, which had no doors connecting them. One Phillips leased the room from Elliott, and had entire control of it, keeping his bed there. After describing the room substantially as is stated above, the first witness for the State, one Clem, testified that about six months before the finding of the indictment defendant and six others played at a game of cards in the room. During the time of playing all the doors were closed, and no one could enter but by knocking and admission from the inside, but no one came in while the defendant and others were playing. The bill of exceptions recites that some of this evidence was drawn out by cross-examination.

The State then introduced another witness, one Condon, and proposed to prove by him that the room about which the witness Clem testified, and in which the playing took place, was a room which the public frequented. The defendant objected, on the ground that the State "had offered evidence tending to show that the playing was done at a house where spirituous liquors were sold," &c., and had thereby elected to contend for a conviction for that offence, and "could not thereafter introduce evidence of a playing at any public place, made public by persons frequenting it."

The court overruled the objection, and permitted the witness to testify "respecting the character of the rooms as being frequented by the public," and defendant duly excepted. This witness testified that Phillips was a professional gambler, and kept his bed and a gaming table in the room. Any one "known to be a sportsman," or who desired to play cards, could gain admission by knocking at the door, and making known that he desired a game. The door was kept locked, and no one could enter while playing was going on, except after knocking and getting permission from the inside. As many as five or six would go there and play at a time, and frequently did play in the room. Witness was present at the time testified to by the witness Clem, and his testimony about the playing, in which the defendant took part, was substantially the same as Clem's. The State having closed, the defendant moved the court to compel the solicitor to elect the character of place, under § 3620 of the Code, for playing at which he would seek a conviction. This motion was overruled, and the defendant excepted.

The defendant then requested the court to give two written charges, which the court refused, and the defendant duly excepted. The first of these charges directed the jury not to convict for a playing at a "public place," if they believed that the playing took place in the room described, and that at the

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time of the playing the doors were locked, and no one could enter but by permission from the inside. The second charge asserted, in substance, that there could be no conviction unless defendant played at cards or dice, "in some room or house, or some public place, to which the general public had a right to enter, at the time of the playing, and go as the public; or that the room or place had been made public by general invitation, allowing the general public to enter unbidden and without restraint; or that the surrounding circumstances were such as to induce the public so to consider it."

WILLIAM H. BARNES, for appellant.

JOHN W. A. SANFORD, Attorney General, *contra*.

BRICKELL, C. J. — The indictment is in the form prescribed by the Code, charging gaming at the several places prohibited by the statute, disjunctively. Such an indictment does not include more than one offence; and if the State offers evidence of more than one, the defendant may compel an election of one or the other as the single offence for which he is to be prosecuted. Or if the State offers evidence of a particular act of gaming, at a particular place, so as to identify and individualize it before the minds of the jury, an election to prosecute for that particular act is made, which cannot be subsequently waived, and another and distinct act proved as ground of conviction. *Elam v. State*, 26 Ala. 48; *Cochran v. State*, 30 Ala. 542; *Hughes v. State*, 35 Ala. 351.

No case for an election was presented under the evidence disclosed in the record. The evidence was only of one act of gaming, at a particular place. No attempt was made to prove any other. The first witness introduced, in describing the place at which the gaming occurred, stated that it was in the same building with a retail liquor saloon, but separated from it, and was rented by and under the control of a different person. Some of the evidence was elicited on cross-examination. The defendant insisted the State, by the introduction of this evidence, had elected to proceed for gaming at a storehouse or place where spirituous liquors were sold, and could not subsequently offer evidence that the place of playing was a public house, or a public place. The theory of the principle on which the public prosecutor (when an indictment is so framed as not to designate the particular transaction or act to which it refers, or contains several counts charging the offence to have been committed in different ways) is compelled to elect on what count of the indictment, or the particular transaction or act exhibited in proof, for which he will proceed, is the prevention of prejudice

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to the defendant, in the eyes of the jury, by bringing against him evidence tending to show crimes for which he is not really indicted, and for which he is not finally to answer; to avoid building up and supporting a verdict of guilty in a prosecution for one offence, by evidence of defendant's guilt of another. The principle can have no application when evidence of but a single act or transaction is offered. It is applicable only when evidence is given of different and distinct transactions. Whether the gaming was at a public house, or a public place, or a house where spirituous liquors were sold, was the fact on which the guilt or innocence of the defendant depended. It was the fact which gave the color of criminality to the particular act of gaming. No prejudice could result to the defendant from evidence that it bore the character of all of these places. The dangers of a conviction of one offence by evidence that he had been guilty of another was not involved. No prejudice to him in the eyes of the jury could result, as would have resulted if evidence of his playing at other places had been allowed. He could not be uncertain as to the act of gaming for which a conviction was sought. Therefore no case for compelling an election by the prosecutor was presented. The only result of compelling the prosecutor to state the character he would endeavor to stamp on the place where the gaming occurred, would have been to give the defendant an undue advantage of acquittal, because of the error or mistake of the prosecutor as to the effect of the evidence he would offer. The evidence might prove the place of gaming a public house, or a public place, or a house where spirituous liquors were sold. Under an indictment charging the playing to have been at one of these places, evidence of playing at another could not be received. Not because the playing at the one is a different offence from playing at another, but because there is a variance between the allegation and proof of the manner in which the offence was committed. There is no authority for compelling a prosecutor to an election to prove an offence to have been committed in a particular manner, that a defendant may have an opportunity of claiming an advantage of a variance between the averment and evidence. There was no error in overruling defendant's motion for an order compelling the prosecutor to elect whether he would seek a conviction because the place of gaming was either a public house, or a public place, or a house where spirituous liquors were retailed. Until evidence was given or offered of different acts of gaming, no case for an election existed.

It is not easy to define what is a "public house," or a "public place," within the meaning of the statutes against gaming. The evil the statute proposed to suppress was gaming with cards, dice, or any device or substitute for either, under such

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circumstances as would tend to offend public morals, and to the temptation of the young and unwary into its corrupting practices. The construction given these terms must be such as will subserve the legislative intent. Any house to which all who may wish can go, night or day, and indulge in gaming in its various forms, is a public place within the meaning of the statute. That its proprietor uses it as a bedroom as well as a gaming room, and that entrance can be gained only by knocking at the door, when it was opened from the inside, does not relieve it from the character of a public place. That character is stamped upon it, when one of the uses to which it is appropriated is gaming, and it is free of access to all who are known to engage in it. All such persons are invited to it by the use to which it is appropriated. It is not necessary the door should have been thrown open, and all persons indiscriminately, or, in the words of the bill of exceptions, the "general public," allowed to enter at pleasure. The greater the air of privacy and secrecy which can be given to the place, the more effectual is the lure; and the place when frequented for the purposes of gaming is within the evil the statute proposes suppressing. It is common to all who would gratify the passion gaming engenders and stimulates, and this is publicity. A lawyer's office cannot be said to be a place to which the general public, or all persons indiscriminately, are invited, or have a right to go. Nor is the office of a physician such a place. Each are places of business in which each pursues his avocation; clients are invited to the one, and patients to the other. Each are within the statutory prohibitions, as this court has decided. The house a gambler devotes to gaming, and in which he keeps the appliances of his occupation, open to all who will engage in his sports, no matter with what seeming privacy he may invest it, is a public place within the statute. If it was not, the statute would be illy adapted to the suppression of the evil against which it is directed. The circuit court did not err in refusing the charges requested, and its judgment is affirmed.

Chatteaux v. The State.

Indictment for Carrying Concealed Weapon.

1. *General charge; when exception to, not available.* — A more general exception to a charge, containing separate charges or instructions, given by the court of its own motion, will not require this court to scrutinize the charge. Unless it is wrong as an entirety, the exception is not available.

2. *Carrying concealed weapon; what not sufficient to excuse.* — Reasonable ground to apprehend an attack at a dangerous locality which defendant visited about day-break, will not be a sufficient excuse for casually carrying concealed a weapon, procured for that visit, late in the day at a locality not shown to be dangerous.

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APPEAL from City Court of Mobile.

Tried before Hon. O. J. SEMMES.

Appellant was convicted for carrying a pistol concealed about his person. The testimony tended to show in substance that defendant was a fruit and vegetable dealer in the market at Mobile; that his business required his attention late in the night and early in the morning, he often counting up his cash and carrying it and his books home with him after closing at night; that his route, from his place of business to his home, carried him along the wharf and through a portion of the city known as "Spanish Alley;" that many fishermen congregated in this locality, which was settled by a lawless and mixed population of all nationalities, and that at night and early in the morning it was dangerous to pass through it, and that defendant, or any other person doing so, had good reason to apprehend an attack, and danger even to his life; that the day the pistol was exhibited was the day before Christmas and a very busy one; that prisoner left home about half past three o'clock in the morning, coming through the neighborhood of "Spanish Alley," and the day being cold, and he being busy, kept on all day the overcoat in the pocket of which he had put the pistol early in the morning; that at five o'clock in the evening, and about fifteen minutes after leaving his place of business, prisoner, while on Royal Street, near the post-office, with some letters, took the pistol out of the pocket in which it had been concealed. Appellant proved an unexceptionable character as a peaceable, quiet, and industrious citizen. The court, as the bill of exceptions recites, charged the jury as follows: "If you believe, from the evidence, that the defendant not being threatened with, or having good reason to apprehend an attack, carried concealed about his person a pistol in this county, before the finding of the indictment, and within one year thereof, then he would be guilty as charged. As to what sort of attack is contemplated by the law the court tells you that some specific attack is meant, and not that some locality through which defendant had to pass in the line of his business, late at night, had a reputation for lawlessness. If you find the defendant guilty, the form of your verdict will be, — We, the jury, find the defendant guilty as charged in the indictment, and further find that he be fined not less than fifty nor more than three hundred dollars. If, upon the whole evidence, you entertain a reasonable doubt of the guilt of the prisoner, you should acquit." To the giving of this charge the defendant excepted. The defendant then requested the court to charge the jury "if they believed defendant armed himself, having good reason to apprehend an attack, and to defend himself in going and returning from his home on business, before day and late at night, then he was

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justified in doing so, and if having such weapon in his pocket, at the time shown by the proof, was casual, he is not guilty."

The charge given and the refusal to charge as requested are now assigned as error.

HERNDON & SMITH, for appellant. — An inspection of the charge will show that it was an entire charge, and hence the exception need not have been more pointed. The charge given is in effect a direction to convict, no matter what danger defendant may have had good reason to apprehend, so long as there was not good reason to apprehend a *specific* attack. *Eslava's case* does not militate against this. In that very case "good reason to *apprehend* an attack" in "passing through the streets of a town or city" is stated to be an excuse. It should have been left to the jury to say whether the carrying the weapon concealed was accidental. If it was done unintentionally and casually, it was not a violation of law.

JNO. W. A. SANFORD, Attorney General, *contra*.

MANNING, J. — The charge excepted to in this cause was excepted to as a whole, and was the main charge given by the court of its own motion to the jury. It consisted in fact of several separate charges, or instructions; some of which were undoubtedly correct. Only one of them is here objected to as erroneous. A general exception to such a charge does not authorize this court to examine it in order to find error. The attention of the court below should have been called by the exception to the particular instruction upon which the allegation of error was intended to be predicated. *Cohen v. The State*, in MS.

2. The charge asked by defendant of the court and refused, was properly refused. The evidence shows that the offence of which the appellant was convicted was the carrying of a pistol concealed; and that this was done, or the discovery made that he was so carrying a pistol, at five o'clock in the evening, near the post-office on Royal Street, in Mobile. That he had armed himself with the pistol the night before after midnight, because he was then about to go, in the course of his business, into a dangerous locality in which he had good reason to apprehend an attack, and so had the pistol casually, later in the day, in his pocket, constitutes no sufficient reason for his acquittal.

In *Eslava v. The State* (49 Ala. 355), this court held that the right to carry a pistol, or other weapon concealed, for any of the reasons mentioned in the statute, was coextensive only with the necessity or occasion on which the right depended.

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The courts and juries should not be facile in receiving excuses for violations of this important section of the Criminal Code.

The judgment of the city court is affirmed.

Allen v. The State.

Indictment for Assault with Intent to murder, &c.

1. *Verdict, form of; duty of prosecuting officer as to.* — The prosecuting officer and the court should look after the form and substance of the verdict returned by the jury. If it be insufficient, in either particular, the court should decline to receive it and give the jury instructions which will enable them to correct it.

2. *Verdict; what is a nullity.* — A verdict finding the defendant "guilty of an intent to maim," on the trial of an indictment charging an assault with intent to murder or maim, is a mere nullity, and a motion in arrest of judgment should be sustained to it. If this is overruled and sentence passed, this court will reverse on appeal, and award a *venire facias de novo*.

3. *Assault with intent to murder or maim; what charge as to, erroneous.* — On the trial of an indictment for an assault with intent to murder or maim, a charge that "there must have been a deliberate, specific intention to murder or maim the person assaulted" is calculated to mislead the jury, and is erroneous.

4. *Provocation; what not sufficient to deprive assault of felonious character.* — Sudden passion upon adequate provocation may deprive an assault of its felonious character; but mere passion not suddenly aroused by sudden affray in which the accused was not the aggressor, will not deprive an assault, with a deadly weapon, of its felonious character.

APPEAL from Circuit Court of Limestone.

Tried before Hon. W. B. WOOD.

Appellant, Elijah Allen, was convicted on an indictment charging him with assaulting Cyrus Edwards with the intent to murder or maim him. There were two counts, one averring and the other not stating the instrument with which the assault was made.

The facts developed in the trial showed that defendant and prosecutor were brothers-in-law living in the same house. While prosecutor was absent one day defendant quarrelled with prosecutor's wife. Some words passed about it, and prosecutor having picked up an axe, as he said, to keep defendant from getting it, his wife took it away. Defendant, who had gone round the house, in the mean time got an axe, and came up behind the prosecutor, who then ran around the house pursued by defendant, who finally threw the axe at prosecutor, inflicting a severe wound on the back of the head.

The defendant requested the following charges: "1. That there must have been a deliberate, specific intention to murder or maim Edwards, upon whom the assault was committed" [before defendant could be convicted]. 2. That there are no presumptions or inferences as to the specific intent in cases of assault with intent to murder or maim. 3. That before the

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jury can convict the defendant, they must believe that in the act charged he acted coolly, without passion; and that if there is passion or excitement proven to the satisfaction of the jury, under the impulses of which defendant acted, they must acquit of the charge to murder or maim." The court refused these charges, and the defendant duly excepted.

The verdict of the jury was as follows: "We, the jury, find the defendant guilty of an intent to maim." Afterwards the defendant moved in arrest of judgment "on the ground that under the verdict of the jury the defendant has been and is acquitted of said charge."

This motion was overruled, and the defendant sentenced to three years' imprisonment in the penitentiary.

The refusal to give the charges requested, and the overruling of the motion in arrest of judgment, are now assigned as error.

MCCLELLAN & MCCLELLAN, for appellant. — The specific intent to murder or maim must have existed. The assault must have been deliberate. 28 Ala. 695; *Cabbell v. The State*, 46 Ala. 199. The design to take life or maim must be *proved*. 3 Greenleaf, §§ 14, 15. The crime charged cannot be committed by one in such a passion as to be incapable of forming the specific intent. The verdict of the jury does not support the conviction. Having "*an intent to maim*" is no offence against the law. The finding of the jury is an acquittal of the charge of the assault. The jury having it in their power to pass on defendant's guilt, and having been discharged after rendering the void verdict, defendant can never again be put in jeopardy. This court should order his discharge. *Bell & Murry v. The State*, 48 Ala. 693; *Grogan v. State*, 44 Ala.

JNO. W. A. SANFORD, Attorney General, *contra*.

BRICKELL, C. J. — When the jury return into court with a verdict, it is not a matter of course to receive it in the form in which it is rendered. It is the duty of the court, and of the prosecuting officer, to look after its form and substance, so far as to prevent an unintelligible, or a doubtful, or an insufficient verdict from passing into the records of the court, to create embarrassments afterward and perhaps the necessity of a new trial. The court should require the jury, by their verdict, to pass upon the whole indictment, in such form of words as shall constitute a sufficient finding in point of law, or, if they refuse, decline altogether to accept the verdict. If the court and solicitor had taken the precaution to examine into the form of this verdict, and the court had required the jury,

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in intelligible language, to express the extent of their finding, there would not have been, as there ought not to have been, any necessity for this adjudication. 1 Bish. Cr. Pr. § 832.

The indictment against the appellant contains two counts, charging an assault with intent to murder or to maim. The first count does not state with what instrument, if any, the assault was made; the second charges it to have been made with an axe. The jury returned a verdict of guilty of intent to maim. Because of the insufficiency of the verdict the appellant moved in arrest of judgment, but the motion was overruled, and judgment rendered sentencing him to imprisonment in the penitentiary for the term of three years. The verdict was a mere nullity, and should not have been received. It finds only a part of the issue the jury were empanelled to try. Only one ingredient of the offence imputed to the appellant, — an ingredient which must be attended by an act before it would be the subject of punishment. The mere intent to commit a crime, which is not evinced by an attempt at its commission, cannot be made the basis of a judgment in a criminal prosecution. The jury were bound to find whether the criminal intent they impute to the defendant had been shown by the criminal attempt at execution charged in the indictment. If it was, they should have pronounced him guilty of an assault with intent to maim, as charged in the indictment, and not guilty of an assault with intent to murder. If there was the criminal intent only, and not the criminal attempt at its consummation imputed by the indictment, they should have rendered a verdict of not guilty. The court should have refused to receive the verdict, and have instructed the jury to retire and find the whole matter in issue submitted to them. The judgment of the court pronounced on this insufficient finding must be reversed, and the cause remanded, that a new trial may be had on the indictment, as if that finding had never been returned into court. *Scitz v. State*, 23 Ala. 42; *Clay v. State*, 43 Ala. 350; *Commonwealth v. Hatton*, 3 Grattan, 623; *State v. Phil*, 1 Stew. 31.

The several charges requested by the appellant were properly refused. They assert propositions which have no foundation in law. The first charge asserted that there must have been a deliberate, specific intention to maim or murder the person assaulted. No such words are used in the statute as descriptive of the criminal intent. *Moore v. State*, 18 Ala. 532. An intent to maim or murder, whether deliberate or formed on the instant; whether it is specific or general; if directed against the person charged in the indictment to have been assaulted, is the criminal intent. It is difficult to conceive of a charge which has a more direct tendency to mislead

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the jury than a charge of this character. The same remark is obviously true of the remaining charges. Passion may mitigate an unlawful homicide, when it is sudden and upon adequate provocation. It would also deprive an assault of felonious character under like circumstances. Mere passion, however, not suddenly aroused by a sudden affray in which the accused was not the aggressor, cannot mitigate a homicide, or deprive an assault with a deadly weapon of its felonious character.

The judgment, for the error we have pointed out, must be reversed and the cause remanded, that a *venire facias de novo* may be awarded. The appellant must remain in custody until discharged by due course of law.

Ex parte Reeves.

Application for Mandamus.

Mandamus; when will be denied. — Application for *mandamus* to compel the dismissal of a cause out of a court to which, on application for change of *venue*, the trial was directed to be transferred under a writ of *mandamus* from this court, on a former term, at the petitioner's instance, will be denied. The court expresses surprise that such an application should be made.

THIS was an application for *mandamus*, based on a state of facts set forth in the opinion.

W. D. ROBERTS, for petitioner.

BY THE COURT. — John Reeves was indicted in the circuit court of Coffee county, at the Spring term thereof, 1874, for grand larceny, and moved the court for a change of *venue*, insisting, upon affidavits, that the cause be sent to Covington county; but an order was entered that it be transferred to Pike county, to which said Reeves objected, and took a bill of exceptions. At the Fall term, 1874, of Coffee circuit court, the solicitor for the State and Reeves again appeared therein, and the cause being called, was upon the motion of Reeves, by his attorney, transferred for trial to Covington circuit court. At the Spring term, 1875, of this circuit court, the cause being then there, Reeves, by his attorney, moved that it be dismissed, upon producing a transcript from Coffee circuit court, showing the order for a transfer of the cause to Pike county made before that by which it was transferred to Covington county; which latter, it was insisted, was therefore void. The dismissal being refused an application is made to this court for a *mandamus* to compel the dismissal.

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After considerable time and labor devoted to the record, and case set forth in it, we were much surprised at learning that, at the instance and upon the motion of the attorney for Reeves, at the June term of this court, 1874, our predecessors caused a writ of *mandamus* to be issued requiring that the case of the State against said Reeves be transferred to Covington county, by the circuit court of Coffee county, which was done at the then next term, in the fall of 1874; and that without any mention made of this action of the supreme court, or of said *mandamus*, the motion to dismiss the cause out of the court to which it was required by that writ to be transferred was made by the same attorney who then and now represents Reeves, the person under prosecution. We mention these particulars without anything more at present.

The writ of *mandamus* is denied.

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Indictment for Rape.

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1. *Certificate of clerk, on change of venue; what not essential to.* — It is not essential that the clerk's certificate appended to the transcript of the proceedings of the court from which the *venue*, in a criminal case, is changed, should be under his seal either public or private.

2. *Certified transcript, objection to; when should be made.* — Whether going to trial on an imperfect transcript is a waiver of its defects is not decided, but the court declares it safer to make the objection earlier.

3. *Rape; want of chastity of prosecutrix.* — It is competent in all prosecutions for rape to impeach the character of the prosecutrix for chastity; but this is usually done by evidence of her reputation in this respect, and not by proof of particular acts of unchastity.

4. *Same; conviction may be had on uncorroborated testimony of prosecutrix.* — Although a woman be of ill-fame for chastity she is still under the protection of the law, and there is no principle of law which forbids a conviction on her uncorroborated testimony alone, if the jury, after carefully weighing and scrutinizing it, are convinced of its truth.

5. *Charge; what erroneous.* — A charge which assumes as proved a fact which is disputed, cannot be given without a palpable invasion of the province of the jury and is always rightly refused.

6. *Same.* — The refusal of a charge that "arguments and fancies of counsel are not law" cannot be revised on error, unless the record discloses the argument and fancies referred to.

APPEAL from Circuit Court of Colbert.

Tried before the Hon. W. B. WOOD.

The appellant, James Boddie, *alias* White, was indicted in the circuit court of Lauderdale for rape committed upon one Antilla Little. Upon his application the trial was transferred to the circuit court of Colbert county, in which court he was convicted and sentenced to be hanged.

The bill of exceptions recites that "on the trial the State

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introduced the transcript of the proceedings in said cause had in the circuit court of the county of Lauderdale, from which county the *venue* had been changed on a proper application, and the defendant objected to the introduction of said transcript as evidence, on the ground that it was not properly and legally certified and authenticated." This objection was overruled, and the defendant excepted.

In the further progress of the trial the defence asked the prosecutrix, Antilla Little, "if she had ever said or told to Dosha Boddie that she, witness, had been delivered of a bastard child?" The witness replied that she "had never told her any such thing, nor had any such conversation with said Dosha." Afterwards said Dosha was introduced as a witness, and asked if said Antilla Little had ever said anything to her about being delivered of a bastard child, to which she replied that said "Antilla Little did tell her that she had been delivered of an abortion, and that she wrapped it in a breakfast shawl and threw it into John M. Wilson's mill-pond." This proof was allowed to go to the jury for the purpose of affecting the credit of said witness for truth and veracity. There was no other proof as to the chastity of said witness or in reference to her character for truth or chastity.

The bill of exceptions does not purport to set out all the evidence, nor does it state that these two witnesses were all that were examined on the trial; and the foregoing is the substance of all the testimony set out in the bill of exceptions.

The defendant asked two written charges which were refused, and the defendant duly excepted. The first charge was "that the uncorroborated testimony of the prosecutrix in this cause is not sufficient to convict the defendant, when it is shown that prosecutrix was delivered of a bastard child [here follows a word that cannot be deciphered. — Rep.], and that she wrapped her breakfast shawl around it, and threw her aborted babe in Wilson's mill-pond." The second charge was an instruction to the jury, that the "argument of attorneys and their fancies are neither evidence nor law."

The refusal to give the charges requested, and the admission of the certified transcript in evidence, are now assigned as error.

CLARK & HARRIS, for appellant. — Under the facts of this case the jury was not authorized to convict on the uncorroborated testimony of the prosecutrix. *The People v. Hulse*, 3 Hill, 309; *Leoni v. The State*, 44 Ala. 110. The first charge asked should therefore have been given. The second charge was necessary to prevent the jury being misled, and should not have been refused.

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JOHN W. A. SANFORD, Attorney General, *contra*. — Error cannot be presumed; it must be shown. 34 Ala. 716. The first charge asked invaded the province of the jury, besides asserting an incorrect proposition of law. 31 Ala. 145. There is nothing in the record to show what the “argument and fancies of counsel” were; and hence this court cannot say that there was error in refusing the charge. The certified transcript showed a literal compliance with the statute.

BRICKELL, C. J. — The indictment was preferred in the circuit court of Lauderdale county, and on the application of the defendant the trial was removed to the circuit court of Colbert. On the trial in that court, the defendant objected to the introduction of the transcript from the circuit court of Lauderdale, because it was not legally and properly authenticated and certified. The objection was general, not specifying in what respect the certificate, or authentication of the transcript, was defective. In *Bramlette v. State* (31 Ala. 380), it is said it must be conceded that when the *venue* in a criminal case is changed, the defendant may raise the question of the sufficiency of the transcript certified from the court in which the indictment was found. If the transcript does not substantially conform to the requirements of the statute, he should not be forced to trial, because there will be wanting in the court trying the prisoner sufficient record evidence of the jurisdiction of the court. The court is careful to say the transcript does not create, but is simply evidence of the fact of jurisdiction. Objections to its sufficiency should more properly be made before entering on the trial, and not reserved until the trial has been entered upon. Without affirming that they may not be made on the trial, we merely suggest that they had better be made earlier. There is much force in the argument that by going to trial without objection on an imperfect transcript, its imperfections are waived.

The statute requires, when an order for a change of *venue* in a criminal case is made, that the clerk must make out a transcript of all the entries, orders, and proceedings in the case, including the organization of the grand jury, the indictment, the indorsements thereon, all the entries relating thereto, the undertakings or recognizances of the defendant, all the orders and judgments thereon, and the order for the removal of the trial, and must attach his certificate thereto. R. C. § 4209. We have carefully examined the transcript as it is embodied in the record, and cannot discover that from it is omitted anything the statute requires it to contain. The assembling and organization of the court — the venire for the grand jury, its execution and return — the organization of the grand jury, their finding and

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return of the indictment—the indictment, with the indorsements thereon—the arraignment and plea of the defendant—the setting a day for his trial—the order for the summoning of jurors for his trial, a list of whom was directed to be served on him, with a copy of the indictment—his appearance on the day set for trial, and making application for a change of *venue*, which was granted, and the order of the court for the removal of the trial to Colbert county, are incorporated in the transcript. The certificate of the clerk declares that it is “a full and complete transcript of the records and proceedings of said circuit court.” The transcript and certificate conform substantially, if not literally, to the requirements of the statute, and the defendant was properly held to trial on it. The only objection made to it in this court is, that the certificate is not under the seal of the court. The record does not sustain the objection. The certificate closes, “In witness whereof I have hereunto set my hand, and fixed the seal of this court at office, this 19th day of March, 1875,” and is signed by the clerk in his official capacity. If the fact was as supposed by the objection, it would not render the certificate defective. In *Bishop v. State* (30 Ala. 34), it was held, that it is not necessary the certificate should be under the seal, either private or official, of the clerk.

The evidence of the declaration of the prosecutrix to the witness, that she had borne a bastard child, and destroyed it, was received without objection; we are not required to express any opinion on its admissibility. It is certainly competent in all prosecutions for rape, to impeach the character of the prosecutrix for chastity. This is usually done by general evidence of her reputation in that respect, and not by evidence of particular instances of unchastity. 3 Green. Ev. 214; 2 Whart. Cr. Law, § 1151; 1 Leading Cr. Cases, 228. Her known want of chastity may create a presumption that her testimony is false or feigned. Whether it creates such presumption, the jury must determine from all the evidence. She may be of ill-fame for chastity, but she is still under the protection of the law, and not subject to a forced violation of her person, for the gratification of the propensities of the man who has strength to overpower her. No principle of law forbids a conviction on her uncorroborated testimony, though she is wanting in chastity, if the jury are satisfied of its truth. Her testimony should be cautiously scrutinized, and court and jury should diligently guard themselves from the undue influence of the sympathy in her behalf which the accusation is apt to excite. If she did not conceal, but immediately discovered the offence, and the offender if known to her; if the place of its commission was such that if she made outcry, it would not probably be heard, and bring her assist-

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ance and defence, — these and other circumstances should be considered by the jury. The manner in which she testifies — the consistency of her testimony — should also be carefully considered. If, viewed fairly and carefully, the jury are satisfied of the truth of her evidence, it needs no corroboration from other witnesses to support a conviction. The first charge requested by the appellant does not assert a correct legal proposition, and was properly refused.

Besides, it is a most palpable invasion of the province of the jury. It assumes as proved the fact, which the prosecutrix had denied most positively. True, she was contradicted by one witness, but who can affirm the jury did not, and would not credit the prosecutrix, rather than the witness contradicting her? If the manner in which the witnesses testified, and their whole demeanor and deportment were such as to impress the jury with a higher opinion of the credibility of the prosecutrix than of the witness contradicting, it was their duty to accord it to her. This charge absolves them from this duty, and commands them to accept as indisputably proved the very fact as to which the evidence was in conflict. Our reports abound with decisions declaring that a charge, assuming as proved a disputed fact, invades the province of the jury, and should be refused. *Corley v. State*, 28 Ala. 22; *Carter v. State*, 33 Ala. 429; *Skains & Lewis v. State*, 21 Ala. 218.

In no case, criminal or civil, can an appellate court indulge presumptions adverse to the correctness of the rulings of the primary court. The presumptions which are indulged are in support of judgments. Whatever else may be said of the remaining charge requested by the appellant, whether in any case it would be proper, it is certain, so far as we can ascertain from the bill of exceptions, it was not necessary or warranted by any circumstances attending the trial. The argument or fancies of counsel, against which it is directed, are not disclosed, and we cannot say they were such as required to be met and counteracted by the charge. The court may have refused it, because it was wholly impertinent, and not called for by the course counsel had pursued in the argument of the cause. This presumption we must indulge in support of the judgment, rather than the adverse presumption that the argument of counsel deserved the censure implied in the charge; and that the court had so far disregarded its duty, as to suffer the jury to be impressed, if it was possible so to impress them, with the conviction that they were to accept the arguments of counsel as law, and their fancies as facts. How far the court should either by a charge to the jury, or the interruption of the argument of counsel, interfere with the mode of argument pursued, rests in a large degree in the sound discretion of the

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court. It is only in a clear case that injury has resulted from the interference of the court, or a refusal to interfere, that an appellate court would feel authorized to disturb its rulings on this matter. When counsel either deliberately, or in the excitement which trials before a jury generate, especially of serious criminal accusations, depart from the line of legitimate argument, or pervert, or misstate the evidence, or introduce matters of which there is no evidence, and which may induce unfair impressions, or unjust conclusions in the minds of the jury, the court has power to interfere. Whether the wrong shall be immediately met, and the counsel confined to a legitimate line of argument, or corrected by specific charges to the jury, the court must determine.

We find in this record no error warranting a reversal, and the judgment must be affirmed. The sentence of conviction pronounced by the circuit court, having been suspended that the case might be here reviewed, and the day of execution fixed by that sentence having passed, it is the duty of this court under the statute (R. C. § 4314) to specify the day for the execution of the sentence. It is therefore ordered and adjudged that the prisoner, James Boddie, *alias* James White, be executed by the sheriff of Colbert county, in the manner prescribed by law, on Friday, September the 17th, 1875, between the hours of ten o'clock A. M., and four o'clock P. M.; of that day, by being hanged by the neck until he is dead.

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Indictment for Destroying Public Bridge.

1. *Destroying public bridge; what indictment for, need not allege.* — An indictment, under section 3737 of the Revised Code, charging the wilful destruction or injury, otherwise than by burning, of a designated public bridge erected by authority of law on a specified road, is not demurrable because the ownership and value are not alleged.

2. *Public bridge; what will not authorize destruction of, by private person.* — The worthless and decayed condition of a public bridge, erected by authority of law, or the peril attending its crossing, will not authorize its destruction or injury by one not suffering particular annoyance or injury.

3. *Same.* — If a public bridge, in its original construction and condition, materially impedes the free navigation on a stream which is a public highway, that fact may be shown in defence by a person who destroys the bridge to allow passage for his raft.

4. *Reasonable doubt; what charge as to erroneous.* — The doubt which requires an acquittal must be an actual, substantial doubt generated from a careful weighing of the evidence, and not a mere possibility or speculation. Charges which are so general as to authorize an acquittal upon mere possibility or speculative doubt are properly refused.

5. *General exception to entire charge; when not available.* — A mere general exception to an entire general charge, enunciating several distinct propositions of law, cannot be supported unless the charge as a whole is erroneous.

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APPEAL from Crenshaw Circuit Court.

Tried before Hon. JOHN K. HENRY.

The indictment in this case charged that before the finding thereof, "Thaddeus Owens wilfully injured or destroyed, otherwise than by burning, a public bridge in said county, known and commonly called the Long Bridge; said bridge being erected by authority of law on a road leading from Greenville to Andalusia, commonly called the 'Long Bridge Road,' against the peace," &c.

A demurrer, on the ground that no offence was charged, and that the indictment was defective, because it failed to allege the ownership or value of the bridge, was overruled.

The evidence adduced on the trial showed that the defendant destroyed the bridge, as he said, to enable him to get his raft through. The bridge when destroyed had been built about seven years, and was erected by the commissioners' court of Crenshaw county over "Patsaliga River," where the public road from Greenville to Andalusia crosses the river in that county. The "river" was only used for rafting timber down stream, and this had been begun since the year 1872. Some testimony was introduced showing that the bridge was in a dangerous condition for travel, and that it been "greatly disfigured, by some portions being sunk down," at the time it was destroyed. Other witnesses, however, testified that persons were in the habit of driving cotton wagons over it; that it was perfectly firm, the defect in it being that the bridge "was sunk down some." The river, where it is crossed by the bridge, was about seventy-five feet wide. The principal witness for the State thus described the bridge: "There were three or four arches in the water. Nearest the centre of the river the arches were about twenty or twenty-five feet apart. The bridge was in good condition, only leaning." There was some testimony tending to show that rafts the size of appellant's could float through, and still leave three feet to spare between the arches.

The court gave a general charge to the jury. It asserted in substance that if the bridge was such an one as described in the indictment, and although some of the arches might be in the water, yet if they were no obstruction to the ordinary navigation down the stream, and defendant could have passed his raft without danger, then he had no right to cut down the bridge; that although the bridge might be worthless, yet if it was a public bridge erected by authority of law, the defendant had no right to cut it down, if it did not obstruct the ordinary navigation. "To which charge," the bill of exceptions recites, the defendant excepted.

The defendant then requested fifteen written charges, some of which were given and others refused.

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The various charges refused asserted 1st: If the bridge was worthless the jury must acquit. 2d. If it was in such a state as to render travel over it unsafe or dangerous there could be no conviction. 3d. That if any of the arches were in the bed of the river defendant could not be convicted for cutting them away. 4th. That the State must prove every material allegation, and if there was "any doubt," as to such allegation there could not be a conviction. 5th. If the bridge was of no value the jury must acquit; also in case it was a nuisance. 6th. That defendant is entitled to any and all doubt of his guilt. Exception was reserved to the refusal to give the charges requested; and these rulings, together with the charge given and the refusal to sustain the demurrer, are now assigned as error.

JOHN D. GARDNER, for appellant.

JOHN W. A. SANFORD, Attorney General, *contra*,

BRICKELL, C. J. — The indictment charges a violation of the statute (R. C. § 3737), by the destruction, otherwise than by burning, of a public bridge, erected on a public road, by authority of law. It pursues the words of the statute, and fully defines and describes the offence imputed to the defendant. An allegation of the value of the bridge destroyed was not necessary. The value does not enter into the offence, or its punishment. Nor was an averment of ownership necessary. The offence was sufficiently identified and made specific in the allegation that the bridge was a public bridge, erected by authority of law, over a public road. The ownership, as matter of law, resides in the State, and a specific averment of ownership would have been a mere allegation of the legal deduction from the facts stated in the indictment.

The court, as it was in duty bound, gave a general charge, asserting the propositions of law the indictment and the evidence were supposed to involve. No specific objection was made to this charge, nor the attention of the court or the prosecuting officer drawn to any particular parts of it, as erroneous. It does not invade the province of the jury, nor can it be asserted all the legal propositions are incorrect, if any of them are. A general exception was taken to it, and it could as well be presumed the exception is taken because the court gave a general charge, a charge not requested, as because the charge contained the particular propositions now assailed. No such general exception can be allowed; it is not in consonance with the letter or spirit of the statute, which authorizes the reservation of exceptions. The right to reserve an exception, and incorporate it and the matter to which it refers into the record,

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is statutory. It did not exist at common law, and became a matter of legislation only to subserve and promote the ends of justice and right.

The statute specially defines the office of a bill of exceptions. It is the reservation "of any charge, opinion, or decision of the court, touching the cause of action, and which would not otherwise appear of record." R. C. § 2754. The statute further provides, the "point, charge, opinion, or decision wherein the court is supposed to err, with such a statement of the facts as is necessary to make it intelligible," must be contained in the bill of exceptions. R. C. § 2755. The courts, since the introduction of bills of exception, have invariably required the party in his exception clearly and distinctly to point out the matter in which the court is alleged to err. As is usually said, he must lay his finger on the error. Sheer justice to the court, and to his adversary, requires this clearness and distinctness in the reservation of an exception. It is not to be presumed that a party will except to the action of the court, merely because he has the right of exception. The exception is reserved because of a particular ruling, charge, or decision, prejudicial to him. This ruling, charge, or decision, it is but fair and just to require that he should by his exception clearly and distinctly point out. He must not speculate on the discovery subsequently of some error, not then appearing to him. If there is then error apparent to him, he should by his exception point it out, for the court may have fallen into it by inadvertence, and could at once cure it. If distinctly pointed out, his adversary may, on having his attention drawn to it, prefer to waive the decision on that point in his favor, rather than incur the hazards of a reversal, or the delay and expense incident to an appeal or writ of error. It is not to be permitted a party, by the generality of an exception, to deprive the court of the opportunity of correcting its own errors, or his adversary of waiving the ruling. No prejudice can result to him if the court corrects the error, or his adversary waives the erroneous ruling. It should therefore not be cause of revision, unless it is apparent that it was deliberate on the part of the court, made against the party's exception, and accepted by his adversary. Where the court gives, as it is in duty bound, a general charge to the jury, no general exception, not distinguishing and specifying the parts of the charge supposed to be erroneous, will be supported, unless the charge as a whole is erroneous. This cannot be, and has not been asserted, of the charge given in this cause. It certainly states several correct propositions of law, which grow out of the evidence in the record. Can this court narrow the exception to other parts, which may or may not be erroneous? Can it keep the exception in abeyance

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until, after a critical analysis of the charge, it finds somewhere a lurking error, and then visit it on that error? Shall it do for the exceptant that which he would not do for himself, — limit his exception to such error? If a party interposes a general objection to evidence, which is partly admissible and partly inadmissible, the objection may be overruled, gross though may be the inadmissibility of a part. The reason is not only that he cannot devolve on the court the duty and labor of analyzing the evidence, and separating the legal from the illegal. It rests upon a better reason, that a party knows his rights, and must ask them, and is not permitted to speculate on the chance of obtaining more than he is entitled to by asking it. In other words, he has something to lose as well as gain, by the practice he adopts. If he asks more than he has a right to demand, he cannot complain that his request is denied. It was preferred, and is refused as an entirety. We decline to enter on an examination of the exception to the general charge of the court, for we cannot assert it is in all its parts erroneous.

Various charges were asked by the appellant; some were refused and some were given. The charges refused may be classed under these two general propositions: if the bridge was worthless and impassable, the defendant could with impunity destroy it; or, if the jury had *any* doubt of the defendant's guilt, — whether reasonable or unreasonable; whether a mere speculation, a mere possibility; whether generated by the evidence before them, or springing from the inherent uncertainty attending all human testimony, — they should acquit. The value of the bridge, its worthlessness, or capacity of serving the purposes for which it was erected, was not the subject of inquiry before the jury. If the bridge, because of its want of repair, had worked any particular injury or annoyance to the defendant, a different question would be presented. That, however, was not the question. The only inconvenience or annoyance he is supposed to have suffered would have resulted if the bridge had been in complete repair, and a safe passway for all citizens. That injury or inconvenience resulted not from the condition of the bridge, but from its original construction. If in its original construction, and its condition, it impeded the free navigation of the stream it spanned, that was a fact he could have submitted to the jury. Independent of this fact, he could not claim immunity from punishment, or a right to destroy the bridge, because of its decayed or dangerous condition, which worked him no injury. Its removal or destruction, because of the peril attending its crossing, was committed to a proper jurisdiction. The doubt which requires an acquittal in a criminal case is actual and substantial. It is not any doubt, for some minds indulge doubts on every question which may

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be suggested, and on which they must act. It is not mere possibility or speculation, for these the imagination creates. It is the doubt the evidence generates; when the jury, carefully weighing all the evidence, cannot say they feel an abiding conviction of the defendant's guilt. This is the most frequent definition of a reasonable doubt, and is perhaps as accurate as any which could be given. *Mose v. State*, 36 Ala. 211. The charges refused would have authorized the jury to suppose that any possible or speculative doubt required them to acquit.

There is no error in the record, and the judgment must be affirmed.

Morningstar v. The State.

Indictment for Larceny.

1. *Name of third person; what certainty requisite in indictment.* — Wherever an essential averment of the indictment is the name, or rather the identity, of a third person, the indictment must be as certain to such person as to the person charged. Under section 4113 of the Revised Code, where the defendant's name "is to the grand jury unknown," it may be so averred without further description, and the policy of this enactment should be extended generally to offences against the person and property of a third person.

2. *Indictment for larceny; what insufficient.* — An indictment which describes the owner of the stolen property by her surname only, without any averment that her christian name was unknown to the grand jury, is bad on demurrer.

3. *Case distinguished.* — The case of *Thompson v. The State* (48 Ala. 165) distinguished from this, and reaffirmed.

4. *Ownership; what sufficient proof of.* — The ownership of timber cut on lands is properly laid in one who was in possession asserting title; and these facts, in the absence of evidence to the contrary, are sufficient proof of such averment, without the introduction of the title deeds.

APPEAL from Circuit Court of Escambia.

Tried before Hon. JOHN K. HENRY.

The indictment in this case charged that Henry Morningstar "feloniously took and carried away a large stick of square hewn timber, of the value of fifty dollars, the personal property of Mrs. George," against the peace, &c. The defendant interposed a demurrer on the following grounds: 1. "The indictment does not set forth any offence with sufficient certainty. 2. It does not set forth the christian name of Mrs. George, or aver that it is unknown to the grand jury." The court having overruled the demurrer, defendant went to trial on plea of not guilty. The evidence tended to show "that defendant, in the county and within twelve months before the finding of the indictment, had cut down, hewn, and carried away from a tract of land, claimed by prosecutrix, a large and valuable pine tree, and converted it to his own use." The evidence tended to show that at the time the tree was cut, Mrs. Nancy George, the prosecutrix, was in possession of the land

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through her agent, one Jernigan. Jernigan said he had once owned the land. There was also proof that the husband of Mrs. George, while building a house on the lands some time before the tree was cut, said it belonged to her. No written evidence of title to the lands was introduced, and no other evidence of title was given than above shown.

The court gave a general charge, only one paragraph of which was excepted to. The portion of the charge thus excepted to was as follows: "If the jury believe from the evidence, beyond a reasonable doubt, that Mrs. George was in the lawful and peaceable possession of the land upon which the timber grew at the time it was cut, and it was afterwards carried away, then this would be sufficient evidence of Mrs. George's title to support the indictment so far as the question of ownership is material."

The overruling of the demurrer, and the giving of the charge excepted to, are now assigned for error.

HERBERT & MURPHY, for appellant.

JNO. W. A. SANFORD, Attorney General, *contra*.

BRICKELL, C. J. — An indictment must of necessity be certain as to the person charged. The averment of his true name, or that by which he is usually known and called, sufficiently identifies the person, and is the mark of identifying and distinguishing him from all others. If the person charged is not correctly named, he can take advantage of the error only by a plea in abatement, denying the name imputed, and averring his true name. If he does not plead in abatement, he must plead in the name by which he is charged, and he thereby of record admits it as his name, and estops himself from disputing it in that particular cause. When an essential averment of the indictment is the name of a third person, or rather the identity of a third person, the indictment must be as certain as to such person as to the person charged. When an injury to the person or property of another is the offence charged, a material averment of the indictment is the identity of such person. If the name of such person is stated, a variance between the allegation and proof as to such name is fatal. If the name is defectively or insufficiently averred, it is a cause of demurrer, motion to quash, or in arrest of judgment, and is fatal on error. Wharton on Crim. Law, § 1820; 1 Bish. Cr. Pr. § 119. In indictments for larceny, the ownership of the property must be averred, and both christian and surname must be stated, or the omission excused by an averment that the owner is unknown. 2 Bish. Cr. Pr. § 680.

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There are authorities at common law, that when the name of the person charged is to the grand jurors unknown, a mere averment that it is unknown is not sufficient. It must be accompanied with some other mark of identification, as in one case that he "*was personally brought before the jurors by the keeper of the prison.*" 1 Bish. Cr. Pr. § 119; Wharton Cr. Law, § 242. The Code now declares an indictment must be certain as to the person charged; but when his name is unknown to the grand jury, it may be so alleged without further identification (R. C. § 4113); thus rendering sufficient the mere averment that the name of the person charged is unknown to the grand jurors. The policy of this statute, it was held in *Bryant v. State* (36 Ala. 270), should be extended to kindred questions, and was extended to an indictment for murder averring the christian name of the person slain was unknown. We do not doubt that it should be applied generally to offences against the person or property of a third person.

The indictment avers the property stolen was "the property of Mrs. George," omitting her christian name. The defendant demurred, and the court erred in overruling the demurrer. The christian name was as essential as the surname to the identity and certainty of the person.

We must not be understood as departing from, or doubting the correctness of the decision in *Thompson v. State*, 48 Ala. 165. The loose practice of designating the christian name of parties, or other persons necessary to be described in judicial proceedings, by initials only, has unfortunately prevailed too long to be discountenanced by judicial decision. Courts would not now tolerate it, if it was being introduced. It cannot authorize the entire omission of the christian name.

There was no error in the charge given by the court. Possession of the thing stolen, at the time of the larceny, is in general sufficient evidence of ownership.

The judgment is reversed, and the cause remanded, but the appellant must remain in custody until discharged by due course of law.

Smith et al. v. The State.

Indictment for Assault with Intent to murder.

1. *Autrefois acquit; plea of; when defective.* — A plea of former acquittal interposed as to one offence, based on an acquittal on a trial for another charge, must set forth among other things the indictment on which such trial was had; and failing in this is demurrable.

2. *Conspirators; acts of one when evidences against all.* — Where several persons combine to commit an offence, what is said and done by one in the presence of the

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others, while in the commission of the offence, is admissible evidence against all of them, both as parts of the *res gestæ* and as acts of a confederate coöperating with the other conspirators in an unlawful act.

8. *Res gestæ*; admitting testimony as, when not revised. — Declarations made by the party beaten to a third person, in the absence of the prisoner, as to the circumstances of the assault, may under some circumstances constitute part of the *res gestæ*; hence where all the evidence is not set out, and the statements in the bill of exceptions, without being definite, produce an impression that there was a nearness of both time and space between the assault and declarations, the appellate court cannot say that it was error to admit them.

APPEAL from Pike Circuit Court.

Tried before Hon. H. D. CLAYTON.

The appellants, Will Smith and Emanuel White, were indicted and convicted for an assault with intent to murder, committed upon one Josh Heering.

On the trial they interposed a plea of *autrefois acquit*, the whole of which, omitting caption and formal parts, was that "the grand jury of Pike county, at its session at the Fall term of the circuit court of said county, preferred and returned into said court 'a true bill' against these defendants, charging them with having committed a robbery from the person or in the presence of Josh Curry; being the individual Josh Curry [it is copied *Heering* in the indictment under which this trial was had. — Rep.] named in the present indictment and none other; that to said indictment for robbery they pleaded 'Not guilty,' whereupon issue was joined by the State, and both defendants and the State threw themselves upon the country, and a jury composed of twelve lawful men returned a verdict of 'Not guilty,' judgment being entered upon said verdict of not guilty, thereby acquitting and discharging these defendants; and defendants say that the offence for which they were indicted in said charge of robbery was the identical offence for which they were indicted, and none other; that the facts which constitute the offence on which said former indictment was preferred are identically the same upon which the present indictment is founded; that they have not done, performed, caused or suffered any acts upon which the present indictment is founded, other than upon which the said indictment for robbery was based."

The court sustained a demurrer to this plea.

The prosecutor testified that while walking along the public road with the defendants, Will Smith seized prosecutor by the collar, the defendant Emanuel White drawing a knife at the same time. They carried defendant some distance from the road, and Emanuel White, by Smith's direction, cut a large stick and gave it to him. About this time Alex White, who was jointly indicted with defendants, but had escaped before trial, "came up, and prosecutor asked what he had done. Alex

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White motioned his hands towards him, and made some indistinct utterances which the witness could not understand."

The court refused on motion of defendants to exclude the testimony as to what Alex White said and did, and they duly excepted. The bill of exceptions then recites: "Will Smith then knocked witness down, and stamped his head with his feet, and witness being stunned by the blows remembers nothing more of any beating. After this, witness pulled up by a small bush, when Will Smith stated 'You are nearly gone,' they then being about ten feet apart. The affair occurred on the edge of a branch in said county. When witness got up he fell in the branch, where it was four feet wide and about knee-deep, and then crossed on the other side and went off; meanwhile defendants had left the place. After going a short distance into the field, witness met some other persons and told them what had taken place." The defendants objected to the witness' stating what took place in the field and the conversation which was had between them, which consisted in witness' telling them the circumstances as already stated. The court overruled the objection and permitted the witness "to state what he told the persons in the field had taken place."

The State then introduced two witnesses who testified "to having met said Josh Curry in the field as testified to by said Curry," and also stated what Curry told them about the circumstances of the difficulty, being the substance of what had already been stated by Curry. The court received this evidence against defendants' objections, and they duly excepted. The bill of exceptions does not profess to set out all the evidence.

The various rulings to which exceptions were reserved are now urged as error.

Neither the record nor docket gives the name of counsel for appellant.

JOHN W. A. SANFORD, Attorney General, *contra*.

MANNING, J. — 1. The plea of former acquittal upon an indictment for robbery is not sufficiently pleaded in this cause. It should have set out the indictment. We are not able to see from the plea that the acquittal of the crime of robbery exempts defendants from prosecution for the offence of an assault to commit murder. The plea was, therefore, correctly held to be insufficient. *Henry v. State*, 33 Ala. 389; *Foster v. State*, 39 Ib. 229; 1 Bishop's Crim. Law, §§ 680 *et seq.*

2. It was not error to admit against these defendants what was said and done by one of their associates in their presence,

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at the time and place the offence charged is supposed to have been committed. According to the evidence Alexander White, who, it is set forth, has escaped, was a confederate. What he said and did was admissible, both on the ground that he was a confederate of the defendants, coöperating with them, and also because it was a part of the *res gestæ*.

3. The question arising out of the declarations made by the witness upon whom the offence is alleged to have been committed, soon after the commission of it, to third persons, and the admission of those declarations by testimony of the party and of such third persons, is not presented as it should be by the recitals in the bill of exceptions. There is nothing there to show either how long after the transaction the declarations were made, or how far distant from the scene the third persons were to whom they were made. The bill of exceptions produces the impression that there was nearness both of time and space, but it is wholly indefinite as to the degree of nearness.

The declarations, under certain circumstances, might be admissible as part of the *res gestæ*. In *Gandy v. Humphries* (35 Ala. 617), R. W. WALKER, J., said: "When it is said that declarations, to be admissible as part of the *res gestæ*, must be contemporaneous with the principal transaction, it is not meant that they shall be coincident in point of time with the main fact. If they appear to spring out of the transaction, if they serve to elucidate it, and are made so shortly after the happening of the main fact as to stand in the relation of unpremeditated result to it, the idea of deliberate design in making them being fairly precluded by the surrounding circumstances, then they may be regarded as contemporaneous." *Wesley v. The State*, p. 182.

The bill of exceptions is so vague that we cannot tell whether these conditions did or did not attend the making of the declarations admitted as evidence in the case before us; and it does not profess to set out all the evidence in the cause. Under these circumstances, and under the rule that the party excepting must by his bill of exceptions affirmatively show error in the instructions and rulings of the court below, we cannot decide that there was such error.

The judgment of the circuit court is affirmed.

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Williams & Youngblood v. The State.

Indictment for Larceny.

1. *Declarations of prosecutor and response of defendants thereto; when not competent evidence.* — Proof that the prosecutor, after he had been drawn and summoned as a grand juror, proposed to the defendants not to prosecute them if they would pay for the stolen property, which offer was refused, is properly rejected as evidence for the defence, unless shown to be parts of the *res gestæ*.

2. *Charge to jury; what erroneous.* — A charge that the jury must acquit, "if from all the evidence there is a probability of the innocence of the defendants," is, without more, calculated to mislead the jury and is properly refused.

3. *Larceny; constituent elements of.* — To constitute larceny it is not necessary that the taking should have been with the intent to appropriate the goods to the use of the prisoner; it is sufficient if there is a criminal intent to deprive the owner of his property.

4. *Charge to jury; what, error to refuse.* — It is error to refuse to charge the jury, on the trial of an indictable offence, that they must be satisfied "beyond all reasonable doubt and to a moral certainty" of the existence of every fact necessary to establish the defendant's guilt.

5. *Good character, proof of; how to be weighed.* — Proof of good character is admissible in all criminal prosecutions, not only where doubt exists on the other proof, but also to generate a doubt. Such proof, however, is not to be considered "independent of," but in connection with the testimony; and it is for the jury to say, after a deliberate consideration of all the evidence, whether it establishes the guilt or innocence of the prisoner.

APPEAL from Circuit Court of Pike.

Tried before Hon. H. D. CLAYTON.

The appellants, J. H. Williams and Oscar Youngblood, were indicted and convicted for the larceny of two yearlings, the property of F. A. Boswell.

Boswell was introduced as a witness and testified as to the loss of his cattle. On cross-examination it was proposed by the defence to prove by him that after he had lost the cattle, and after he had been notified that he had been drawn as a grand juror, he offered not to prosecute the defendants if they would pay him \$30, which proposition they declined. The court refused to allow this proof to be made, and the defendants excepted. Several witnesses were introduced on both sides, and the testimony was conflicting. The evidence on the part of the State tended to show that the defendants, while in charge of a drove of cattle, passed by the field where the prosecutor's cattle were grazing, turned them in the drove and carried them to Montgomery where they were sold. The testimony for the defence tended to show that the cattle seen in the drove, and thought by the state's witnesses to belong to the prosecutor, were not his, but had been bought by defendants from their owners who lived in the neighborhood. The evidence was also conflicting as to the marks and appearance of the two yearlings seen in the drove. The prisoners also introduced proof of good character.

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The defendants asked several written charges; four of which the court refused, and the defendants duly excepted. These charges were as follows: "1. If from all the evidence there is a probability of the innocence of the defendants, the jury must find them not guilty." "2. If the jury is not convinced by all the evidence to a moral certainty that the defendants feloniously took and carried away the two yearlings alleged to have been stolen, with the intent to appropriate them to their own use, then they must find them not guilty." "5. The State is required to show by evidence beyond all reasonable doubt and to a moral certainty the existence of every fact necessary to establish the guilt of defendants, before they can be convicted; if from all the evidence the jury believe the State has failed as to one single fact necessary to be proved, then they must find the defendants not guilty." "8. The law says if the defendants have proved a good character, such good character may be looked to, independent of the evidence in the case, to generate a doubt of their guilt."

JNO. D. GARDNER, for appellant. — The question to Boswell was proper. It tended to show a willingness to stand a prosecution, after being notified that it was pending. It was an act of the parties which shed light on the motives of defendants, and was a fact pointing to innocence. *Hunter v. State*, 43 Ga. 523. The charges refused should have been given. *Joe v. The State*, 3 Ala. 422; 36 Ala. 211.

JNO. W. A. SANFORD, Attorney General, *contra*. — The refusal to allow Boswell to answer the question put to him was proper. The evidence offered constituted no part of the *res gestæ*. The charges asked were properly refused. *McAlpine v. The State*, 47 Ala. 78. These charges all had a tendency to mislead the jury.

BRICKELL, C. J. — The offer of appellants to prove by the prosecutor, that after he had been drawn and summoned as a grand juror, he proposed to appellants not to prosecute them if they would pay him thirty dollars, which they refused, was properly rejected. A prosecutor of an indictment, for a violation of the criminal laws, though the offence may have been committed against his property, is not a party, in such sense that his admissions or declarations can be received in evidence, for the purpose of defeating the prosecution. The prosecution is beyond his control, and whatever facts may be necessary to support the defence must be proved otherwise than by his admissions or declarations. These may be admitted to affect his credibility as a witness, as under a proper

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state of facts they would be received to impeach the credibility of any other witness. Beyond this they are inadmissible, unless parts of the *res gestæ*. Roscoe Cr. Ev. 52. Nor was the evidence admissible in connection with the fact that the appellants rejected the proposition. Their acts or declarations, not parts of the *res gestæ*, could not be given in evidence by them.

The first charge requested by the appellants was properly refused. It would have involved the jury in doubt and uncertainty, unless it had been carefully explained to them what was intended by a *probability of innocence*. A charge having a tendency to mislead or confuse the jury should be refused. The second charge was also properly refused. To constitute the offence of larceny, it is not necessary the taking should have been with an intent to appropriate the goods to the use or benefit of the person taking. The criminal intent consists in the purpose to deprive the owner of his property. No benefit to the guilty agent may be sought, but only injury to the owner. Rosc. Cr. Ev. 644.

The charge numbered five asserted a correct legal proposition, and should have been given. It cannot be doubted that in all criminal prosecutions the evidence must satisfy the jury to a moral certainty of the defendant's guilt, before they render a verdict of guilty. If the jury are not morally certain of every fact necessary to guilt, they cannot be said to be without reasonable doubt. This is all we understand the charge as asserting, and it should have been given as requested. *Mose v. State*, 36 Ala. 230; 3 Green. Ev. § 29.

The charge numbered eight was properly refused. The good character of the accused is a fact which may be given in evidence in all criminal prosecutions, whether for felony or misdemeanor, not only where a doubt exists on the other proof but to generate a doubt of guilt. *Feliz v. State*, 18 Ala. 720; *Dupree v. State*, 33 Ala. 380; *Harrison v. State*, 37 Ala. 154; *Hall v. State*, 40 Ala. 698. It is not, however, as this charge supposes, to be considered independent of, but in connection with the other evidence; and the jury are to say, after a deliberate consideration of all the evidence, whether the defendant is guilty or innocent.

It is unnecessary to notice the other matters presented by the bill of exceptions. For the error pointed out, the judgment is reversed and the cause remanded. The defendants must remain in custody until discharged by due course of law.

[Franklin v. State.]

Franklin v. The State.

*Indictment for Obtaining Goods by False Pretence.*52 414
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1. *False pretence; allegation as to, construed.* — An allegation in the indictment that defendant falsely pretended that “he *had* one small black mule,” is rightly construed as an averment that he “*had*” the mule as owner.

2. *Same; what charge erroneous.* — On the trial under the indictment a charge directing an acquittal “if defendant *had* the mule, whether he owned it or not,” is properly refused, where the proof shows that although defendant was in possession of the mule he did not own it.

3. *Same; what variance immaterial.* — Where the false pretence charged was to H. B. Clark, and that proved was to Hiram B. Clark, the variance is immaterial, if the proof shows that H. B. Clark and Hiram B. Clark were the same person.

APPEAL from Circuit Court of Crenshaw.

Tried before Hon. JOHN K. HENRY.

The facts are fully stated in the opinion.

J. M. WHITEHEAD, for appellant.

JOHN W. A. SANFORD, Attorney General, *contra*.

MANNING, J. — The indictment in this cause sets forth that defendant “did falsely pretend to H. B. Clark, with intent to defraud, that he had one small, black, mare-mule, about eighteen years of age, and by means of such false pretence, obtained from the said H. B. Clark one mouse-colored, or bay horse-mule,” and is in the form prescribed by the Code.

The proof shows that defendant rode a small, black, mare-mule to the house of one Isaac L. Mills, and there proposed to Hiram B. Clark to purchase a mule of him, upon credit; that Clark demanding security for the price, defendant, after some other conversation between them, offered to Clark to give him a mortgage on both mules for security, and did so, — and that he said that he owned the black mare-mule; though, in fact, he did not own her, but she belonged to another person.

The court, among other charges to the jury, instructed them “that the word ‘*had*,’ as used in the indictment, in which it is charged that defendant falsely pretended that he *had* a small black mule, &c., means more than to assert the mere possession of the mule, *but* meant to assert ownership of the mule;” to which instruction defendant excepted, and he asked of the court, in writing, six other charges to the jury; which the court refused to give, and defendant excepted.

The charge given by the court was correct. The indictment meant that defendant falsely pretended that he *had* the mule as owner.

Independently of any other ground of objection to the first
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three charges asked and refused, they were exceptionable, because they, by a mistake in writing them, all relate to the mule obtained, instead of the other mule which he pretended that he owned.

The sixth charge asked presents in a proper form the point intended to be made in the first three, — to wit, that if defendant “had the mule he pretended to have, whether he owned her or not, they must find the defendant not guilty.” This charge was correctly refused, for the reason already mentioned, that the word “*had*,” in the indictment, means assertion of ownership.

For this reason, also, the fourth charge asked was correctly refused.

The fifth charge asked, which is: “If the jury believe the evidence, they cannot find the defendant guilty,” — defendant insists ought to have been given; because the indictment charges that the false pretence was made to H. B. Clark, and the evidence shows that Hiram B. Clark was the person with whom he dealt. If there be evidence in the cause that the person referred to is known and called as well by the name of H. B. Clark as that of Hiram B. Clark, then the fifth charge asked ought not to have been given. It was for the jury to determine whether the name used in the indictment did not as correctly designate the person referred to as the other. In this record there is such evidence. The mortgage executed by defendant to Clark, and which is set out in the bill of exceptions, first sets forth the name of the latter as Hiram B. Clark, — but afterwards, and four different times, it designates him by the name of H. B. Clark.

The judgment of the circuit court is affirmed.

Faulk *et al.* v. The State.

Indictment for Arson.

1. *Error of trying plea of not guilty and autrefois acquit together; when cured.* — If the defendant pleads not guilty and former acquittal at the same time, and, without objection, proceeds to trial on both, in a misdemeanor case, he waives the irregularity, and cannot complain if the jury pronounces on both pleas together. A failure to make the objection in a case of felony is not a waiver, and advantage may be taken of the irregularity by motion in arrest of judgment or on error.

2. *Same.* — Where the defendants pleaded not guilty and former acquittal, and the court in response to an inquiry whether it would try the plea of former acquittal first, informed them that “they might determine the matter for themselves, but it might not be best for them;” whereupon they consented to try both issues together, but objected, after the evidence was closed, to the trial of both issues at once, the consent will be regarded as induced by the intimation of court, and will not amount to a waiver. This irregularity was cured, however, when no legal evidence is offered to support the plea of former acquittal.

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3. *Plea of former acquittal; what necessary to support.* — To support the plea of former acquittal it is not sufficient to put in evidence the record relied on, although it embraces the indictment on which judgment is pronounced. There must also be proof of the identity of the parties and the offence. A record showing a judgment quashing an indictment on demurrer is wholly worthless in support of a plea of former acquittal.

4. *Conviction on circumstantial evidence, rule as to.* — The case of *Faulk et al. v. The State* (in MS.) explained, and the doctrine, laid down in *Mickle v. The State* (27 Ala. 22) again declared, — that the true test for determining the propriety of a conviction on circumstantial evidence is not whether the circumstances proved produce as full conviction of guilt as the positive testimony of a single credible witness, but whether they produce moral conviction to the exclusion of every reasonable doubt.

5. *Practice; what improper.* — However erroneous the circuit court may deem an opinion of the supreme court, it is neither proper nor just to the parties to diminish its influence with the jury by declaring that it is not law, yet they must be governed by it.

APPEAL from Circuit Court of Crenshaw.

Tried before Hon. JOHN K. HENRY.

The appellants were indicted and convicted for arson, and sentenced to two years' imprisonment in the penitentiary. The evidence connecting them with the commission of the offence was purely circumstantial. The opinion states all the facts necessary to a proper understanding of the case.

Neither the record nor docket gives the name of appellants' counsel.

JOHN W. A. SANFORD, Attorney General, *contra*.

BRICKELL, C. J. — A plea of former acquittal and of not guilty should not be interposed at the same time. The plea of former acquittal should contain a protestation of innocence, and should precede a plea of not guilty. This last plea is not necessary, if the first prevails. 1 Bish. Cr. Pr. §§ 577, 578. If the two pleas are tendered together, they should not be submitted to the jury at once, but the court should order the special plea passed upon first. *Ib.* If the plea is determined against the defendant, he is allowed to plead over, and to have his trial for the offence itself. 1 Whart. Am. Cr. Law, § 578. On an indictment for a misdemeanor, if the defendant interposes the plea of *autrefois acquit* or *autrefois convict*, and the plea of not guilty, at the same time, and without objection proceeds to trial on both, he waives the irregularity, and if the jury pronounce on both pleas, he cannot take advantage of it. *Dominick v. State*, 40 Ala. 680. In a case of felony the rule is different; the failure to make objection to the trial of both issues at the same time is not a waiver of the irregularity, and advantage of it may be taken, in arrest of judgment, or on error. *Foster v. State*, 39 Ala. 229.

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The appellants were charged with felony, and by consent of the State pleaded at the same time, by the mere titles of the pleas, "former acquittal," and "not guilty." They inquired whether the court would not try the issue of *former acquittal* first. The court declined to express an opinion, but said the defendants could do as they wished, about trying both issues together. It was for them to determine; it might not be best for them, but the court, if they wished, would first try the plea of former acquittal. The defendants then agreed that both issues should be submitted to the jury, and the trial proceeded. After the evidence on both issues had been closed, the defendants objected to the trial of them at the same time. The court inquired if the defendants objected to the jury, which had been empanelled, and had heard the evidence, trying first the plea of former acquittal, and then the plea of not guilty. The defendants objected, and the court directed the trial on both pleas to proceed, to which defendants excepted.

The court should of its own motion have directed a trial first of the plea of former acquittal, without an application from the defendants, or inquiring from them as to whether that course should be pursued. Nor do we see the propriety of the intimation that it would or might be best for the defendants that both issues should be tried at once. The action of the defendants should not have been influenced by such an intimation, and it is difficult to conceive the injury which would result to them from a separate trial of the issues. Though the defendants consented to the trial of both issues, the consent was given under the pressure of the intimation that this course was best for them, and it should not be regarded as a waiver by them of the irregularity. This error would operate a reversal of the judgment, but the evidence offered in support of the plea is wholly matter of record, consisting of a judgment of conviction (but for what offence does not appear) at the Spring term, 1874, of the circuit court of Pike county, and a judgment sustaining a demurrer to an indictment against the defendants, at the Fall term of said court. Neither indictment was offered in evidence, nor any evidence offered that they were for the same offence charged in the present indictment. To support a plea of former acquittal or former conviction, it is not sufficient simply to put in the record, even when it embraces the indictment on which judgment is pronounced. Evidence must be given that the offences charged in the present and former indictment are the same. 1 Bish. Cr. Pr. § 581. The record of the judgment of conviction did not tend to support the plea of former acquittal; and the record of the judgment on the demurrer to the indictment, and quashing it, was not in any sense a judgment of acquittal, barring an-

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other prosecution. R. C. § 4146. There was no pretence for the plea, and the error of submitting it to a trial with the plea of not guilty was not injurious to the appellants. If the plea of former acquittal had been drawn in full, instead of being pleaded by its title, and had stated the judgment on the demurrer as the judgment of acquittal relied on, it would have been a mere nullity, which could have been stricken out on motion.

It seems from the charge of the court that this cause was assumed to have been before this court, and an opinion then delivered, which the court read to the jury, and said: "I give you this in charge as the law in this case, by which you are to be governed in considering the facts in this case submitted to you. Although I do not believe it to be a true exposition of the law on this subject, yet you are to be controlled by it in the case now before you." To this charge an exception was reserved. There is no evidence in the record that the case was ever before this court. Indeed it is apparent this case never could have been here, for the indictment was found at the last March term of the circuit court, and the judgment of conviction then had, from which this appeal is prosecuted. Some other case between the parties may have been here, and we may conjecture, from the similarity of names and of offence, it was the case of *Hannah Faulk et als. v. State of Alabama*, at the June term, 1874, in which it was held, that in a criminal case, a charge in these words should have been given, where the evidence is wholly circumstantial: "To convict the defendants the evidence should be as strong as the positive testimony of one credible witness who proves beyond all reasonable doubt the guilt of the defendant." The court interpreted the charge as asserting only the familiar legal proposition, that the evidence should satisfy the minds of the jury beyond all reasonable doubt of the guilt of the defendants. We are satisfied the court was mistaken as to the true interpretation of the charge. It was intended to assert, and does assert the proposition, repudiated by this court in *Mickle v. State*, 27 Ala. 23. The proposition has no authority on which to rest, except an intimation of Mr. Starkie, to which the court referred, that a test of the sufficiency of circumstantial evidence is, whether the circumstances proved produce as full conviction as the testimony of a single credible witness. No such test exists; the only test is, does the evidence, whether positive or circumstantial, exclude from the minds of the jury every reasonable doubt of guilt. It is manifest, if the court had interpreted the charge, as we are constrained to interpret it, as authorizing a comparison of positive and circumstantial evidence, and the formation of a conclusion because the circumstantial was, or

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was not, supposed to be the equivalent of the positive evidence of one or more witnesses, it would not have been sanctioned. We may be permitted to suggest that however erroneous the circuit court may deem an opinion of this court, it is not proper, nor just to the parties, to diminish its influence with the jury by declaring it is not law, yet that they must be governed by it. The court should either charge directly in conformity to it, so that the party entitled can have the full benefit of it; or distinctly announce its own view of the law, so that he may have the full benefit of an exception. The charge of the court could not, however, have worked any injury to the defendants. It was more favorable to them than they had a right to demand.

The several charges requested by the appellants, in reference to a former judgment of conviction, were abstract. They were without evidence to support, or having a tendency to support them, and were properly refused. 1 Brick. Dig. 338, § 41.

The charge given at the instance of the solicitor asserted a correct proposition, which is fully supported by the case of *Mickle v. State, supra*. If the evidence removed from the minds of the jury all reasonable doubt of the guilt of the defendants, it was their duty to convict, although they would have been more fully convinced by the positive evidence of a credible witness who saw them commit the act.

There is no error in the record prejudicial to the appellants, and the judgment must be affirmed.

Ex parte Winston.

Application for Certiorari and Habeas Corpus.

1. *Plea of not guilty; waiver of what defects.* — A plea of not guilty is an admission of the genuineness of the indictment and a waiver of irregularities in filing or presenting it.

2. *Objection by prisoner; what he is held to consent to or waive.* — Wherever the prisoner makes an objection, — whether well founded in law or not, — to an indictment, he must be held to consent to that action of the court which would have been proper if the objection was well founded.

3. *Same; what does not work an acquittal.* — If the court sustains the prisoner's objections, and, adopting the erroneous view of the law urged by the prisoner, holds a perfectly valid indictment insufficient, and for that reason enters a *nolle pros.* and discharges the jury, against his objection, after the trial has been entered on, he cannot complain, or afterwards set up the discharge as unauthorized and illegal, and a bar to any further prosecution.

4. *Habeas corpus.* — Whether *habeas corpus* is a proper remedy in such a case is not decided; but the court inclines to the opinion that it is not.

THIS was an application for *certiorari* and *habeas corpus*, based on the following facts: At the Fall term, 1874, of the

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circuit court of Lowndes county, the petitioner was indicted for an assault with intent to murder. The indictment was returned into court, indorsed by the foreman of the grand jury, "a true bill," but the clerk failed to indorse it "filed," and date and sign the indorsement. R. C. § 4148. At the Spring term, 1875, the defendant appeared, pleaded "not guilty," and proceeded to trial before a jury. During the trial, the counsel for petitioner called the attention of the court to the fact that there was nothing to show that the indictment was presented in open court, or ordered to be filed, and that it did not appear to be filed; the solicitor then moved to withdraw the case from the jury, which was done, "and the solicitor moves to enter a *nolle prosequi*, the defendant refusing to allow the amendment, and a *nolle prosequi* is entered in this cause." Leave was given the solicitor to appear before the next grand jury, and present a new indictment, and the petitioner required to give bail for his appearance to answer it. The petitioner objected to a discharge of the jury, and claimed a verdict of acquittal, which was refused. Failing to give bail, the petitioner remained in custody of the sheriff, and made application to the chancellor of the Southern Chancery Division for a discharge on *habeas corpus*, which, on a hearing, was refused. He now moves this court for a writ of *certiorari* to revise the action of the chancellor, and for a writ of *habeas corpus* to be discharged from imprisonment.

CLEMENTS & ENOCHS, for petitioner. — The want of an indorsement and filing of the indictment was waived by pleading to it. 33 Ala. 366. The discharge of the jury, upon this mistake of law, was without necessity and unauthorized. It works an acquittal. *Bell & Murry v. State*, 48 Ala.; *Grogan v. The State*, 44 Ala. 9. *Habeas corpus* is the proper remedy. 30 Ala. 461; 19 Ala. 561; 44 Ala. 9.

BRICKELL, C. J. — It is not necessary to inquire whether at common law, or according to the practice observed in this State prior to the Code, any entry on the minutes of the court of the return and filing in court of an indictment was essential to its authenticity. The petitioner does not appear to have been in custody at the finding of the indictment, and the statute is positive in its inhibition of any entry on the minutes showing its finding. The only duty of the clerk in reference to it was that which pertains to every paper, regularly introduced into court as a part of its record, the indorsement "filed," dated, and signed, in authentication of it. This mere ministerial act of authentication may, as in all other cases, be performed at any time while the cause is *in fieri*, and it is *in*

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fieri until final judgment is rendered. It is the indorsement on an indictment "A true bill," signed by the foreman of the grand jury, which "touches it principally and is the life of it." When that indorsement is made, and it is returned into court, it is a valid accusation, and no subsequent clerical omissions can render it invalid. *State v. Clarkson*, 3 Ala. 378; *Franklin v. State*, 28 Ala. 9. The court, when attention was called to the omission of the clerk to mark the indictment "filed," should have directed the indorsement made, and proceeded with the trial. The omission of the indorsement did not vitiate the indictment, as the court, the counsel for the petitioner, and the solicitor seemed to have concurred in supposing.

If objection could have been made because of the omission it came too late after the plea of not guilty, the empanelling a jury, and a trial of the facts had been entered upon. The only issue then involved was the guilt or innocence of the accused. All inquiries into the genuineness of the indictment were without this issue, and if introduced would only involve and embarrass the real issue. *State v. Matthews*, 9 Port. 370. When the defendant pleaded not guilty, and put himself on the country, the genuineness of the indictment, as an accusation emanating from the tribunal having authority to prefer it, properly introduced into the court having jurisdiction to pronounce final judgment on it, was admitted. The court could, and should have proceeded then without any inquiry into the want or sufficiency of the clerk's authentication of the indictment. *State v. Clarkson*, 3 Ala. 378; *Russell v. State*, 33 Ala. 366; *Mose v. State*, 35 Ala. 421. There was no necessity that a *nolle prosequi* should be entered and the defendant held to answer a new indictment, and the court erred in consenting to its entry.

The error was, however, superinduced by the defendant. It was his suggestion that produced it, and his failure and refusal to permit an amendment by the making of the indorsement, when the attention of the court was called to its omission. Of such an error he cannot be permitted to avail himself. If the defendant's suggestion had been of any force, — if the omission of the clerk to make the proper indorsement had affected the validity of the indictment, and he had been in condition to avail himself of the objection, — then, he was not in jeopardy. The defectiveness of the indictment would have vitiated any judgment of conviction rendered on it, and such judgment he could have reversed on error. His suggestion involved the assertion that he was not in jeopardy, for an indictment so defective as not to warrant a judgment of conviction does not place a defendant in jeopardy. 1 Whar. Am. Cr. Law, § 587; 1 Bish. Cr. Law, § 663. The court accepted

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the suggestion as well founded in law, and sincerely made. Into error the defendant invited the court, and refused to consent that the defect in the indictment should be amended and the trial proceed. He objected to the discharge of the jury, and claimed a verdict of acquittal. If his suggestion had been well founded, there was no alternative but a discharge of the jury, for there was nothing for them to try, and they could not render a verdict of acquittal, for there was no accusation of which to acquit the defendant. When the defendant suggested that the indictment was not genuine, — that it did not bear the evidence of authenticity which it should bear, and induced the court to act on the suggestion, — he must be deemed as consenting to the action of the court, which would have been right and proper if the objection had been well taken. No party, whether in a criminal or a civil proceeding, can invite the court into error, and subsequently take advantage of the error. The maxim "*Consensus tollit errorem*" then applies in full force.

If the petitioner had been in jeopardy and had been entitled to a discharge from further prosecution, we do not wish to be understood as recognizing *habeas corpus* as his proper remedy. A plea to a new indictment, if one should be preferred, we are inclined to think the only available remedy. It is not necessary, however, now to decide this question. See 1 Bish. Cr. Pr. § 587 ; *Wright v. State*, 7 Ind. 324 ; *Ex parte Ruthven*, 17 Mo. 541.

The application is overruled.

Webb v. The State.

Indictment for Burglary.

1. *Ownership of house burglariously entered; in whom laid.* — Where the prosecutor by consent of the owner of the freehold erects on it a building, for their mutual convenience, which is in their joint use at the time of the burglary, the ownership is properly laid in them jointly.

2. *Burglary; what indictment for, defective.* — An indictment under section 3695 of the Revised Code, for burglary in a house in which cotton was kept for use, is defective unless it alleges the value of the cotton. Strict correspondence between the allegations and proof on this point is not essential; if the thing on deposit is of any real pecuniary value, proof of such value will support the averment.

APPEAL from Circuit Court of Lowndes.

Tried before Hon. JAMES Q. SMITH.

The facts are stated in the opinion.

No counsel appeared for appellant.

The ATTORNEY GENERAL appeared on behalf of the State.

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BRICKELL, C. J. — In an indictment for the offence of burglary, as defined by the statutes, the ownership of the building must, as at common law, be alleged, and the allegation must correspond with the proof. All difficulty on this point would be obviated if the prosecuting officer, in drawing the indictment, when the ownership is uncertain or in doubt, would insert several counts, averring the ownership to be in the different persons in whom the evidence tends to show an interest. A speedy administration of the criminal law would be promoted, and fewer offenders would escape the penalties they have justly incurred.

The indictment charges the appellant with having broken and entered the cotton-house of Adam Golson and Green Gray. The evidence disclosed that the house was erected by Gray on the lands of Golson, for the joint use of himself and Golson, in which to store cotton, and at the time of the offence was in their joint use. On this evidence the appellant requested the court to charge that the allegation of ownership was not supported, which was refused. It is not easy to lay down in a single sentence a rule by which to determine in whom the ownership should be averred. The authorities collected in the best text-books on criminal procedure justify us in declaring that where there is a right to the use and occupation of the building in one who is actually occupying, distinct from the ownership of the freehold, or the reversionary right on the expiration of the term of the occupier, the ownership is properly laid in the occupier. 2 Bish. Cr. Pr. § 109; 1 Russ. Crimes, 806-820; 2 Whart. Cr. Law, 1577-1591. A house, or other structure, may be converted into a mere chattel, and its ownership severed from the ownership of the freehold. Such conversion and severance occurs, when it is erected under a parol agreement with the owner of the freehold that property in it shall remain to the person furnishing the materials and erecting it. *Foster v. Mabe*, 4 Ala. 402. This house having been erected by Gray, with Golson's consent, on the lands of the latter, for their joint use, and for their common convenience, its ownership was severed from that of the freehold, and it was held by them as tenants in common. The ownership was therefore properly alleged, and the evidence supported the allegation.

The statute dispenses with an assignment of errors in criminal cases, and commands the court to render such judgment on the record as the law demands. R. C. § 4314. No objection was made in the court below to the sufficiency of the indictment, nor has any been made here. It is, however, defective, under the decisions of this court, in *Crawford v. State* (44 Ala. 382); *Norris & Coleman v. State* (July term, 1874); and *Ike*

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Robinson v. State (present term), in failing to aver the value of the cotton, kept in the house broken and entered. This defect compels a reversal of the judgment. It is proper to say, however, that although the value of the cotton must be averred, a strict correspondence between the allegation and proof is not necessary. The allegation is required only to show that the cotton was not worthless, and the breaking and entering was not really into an empty house. If the thing kept in the house is of any real pecuniary value, proof of this value will support the averment. 2 Bish. Cr. Pr. § 706.

The judgment is reversed and the cause remanded, that the indictment may in this respect be amended with the consent of the defendant, or if he fails to consent, a new indictment preferred. The defendant will remain in custody until discharged by due course of law.

Moore v. The State.

Indictment for Perjury.

1. *Oath of jury; what recital sufficient.* — A recital in the judgment-entry that the jury was "duly sworn according to law to try the issue joined," &c., sufficiently shows that the oath prescribed by the statute was administered.

2. *Challenger; what proof of appointment of, sufficient.* — The fact that a person acted as a challenger at an election and was recognized as such by the managers, other officials, and the people, is, as regards third persons and the public, *prima facie* evidence of his authority, and dispenses with the production of a commission; therefore it is not error to allow a witness to testify that he was a challenger and acted as such after receiving oral notice of his appointment from the sheriff.

3. *Perjury; what essential to conviction for, under election law.* — However recklessly the defendant may have taken the oath required of persons challenged, under the election law, there can be no conviction for perjury if the oath is true in point of fact.

4. *Same; what not defence, but may be mitigation for.* — Not voting, after taking the false oath, is no ground for acquittal, but may be urged in mitigation of punishment.

APPEAL from City Court of Eufaula.

Tried before Hon. ALPHEUS BAKER.

The appellant, Willis Moore, offering to vote at a general election held in Barbour county, Nov. 3, 1874, was duly challenged, and thereupon he took the oath prescribed by law before one of the challengers, that he was a duly qualified elector. Moore, on the ground that he was a minor at the time of taking the oath, was indicted for perjury.

On the trial, to show the authority of the person administering the oath, the State introduced the challengers. They were permitted, against the objection and exception of the defendant, to state that they were challengers; that they knew it from the fact that the sheriff verbally notified each of them of his

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appointment before the election. One of them testified that he saw the appointments published in the newspaper. It was also shown that the persons thus notified by the sheriff acted as challengers, and were recognized as such by the election officers and people, and that one of them challenged the defendant and administered the oath on which the perjury was assigned.

The State introduced proof that about a year before the election defendant had made a written affidavit before a magistrate that he was under eighteen years of age, to avoid paying a city street tax. Other witnesses for the State testified to facts tending to show that defendant lacked a year of reaching his majority when the oath was taken.

The defence introduced several witnesses, among them defendant's father, whose testimony tended to show that defendant was twenty-one years of age in October preceding the election. The defendant's father testified that he took the affidavit which his son had made to avoid the street tax, and tore it up, informing him "that he had got it down wrong." It was also shown that defendant, after he was challenged and had taken the oath, left the polls without voting, on the advice of his father, who told him "he wished to study about the matter, as there seemed to be some difficulty getting up about it."

The court charged the jury, that "if they believed the defendant (although no man knows certainly of his own knowledge how old he is) honestly thought or believed when he took the alleged oath that he was twenty-one years of age, they must acquit, and they must also give him the benefit of all reasonable doubts on that point; but if they believed from the evidence that the defendant, without thus honestly believing or knowing, as people usually know it, whether he was twenty-one years of age or not, just for the purpose of getting to vote, recklessly took said oath, that then the jury may find him guilty, although, in point of fact, he was twenty-one years of age at the time he took the oath."

The defendant excepted to the giving of this charge. He then requested the following written charges: "1st. If the jury believe the defendant was twenty-one years of age at the time he took the oath, they are bound to acquit him. 2d. Although the jury believe the defendant made a false oath before the 3d of November, as to his age, yet if the oath taken on that day was true, the jury must acquit. 3d. It makes no difference how many times defendant may have sworn falsely at any other time, if the jury believe he swore truly at the time charged in the indictment, they must acquit. 4th. If the jury find from the evidence that defendant did not vote at the election at which he took the oath charged in the indictment, they

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must acquit. 5th. That before the jury can convict the defendant (his age being the only matter in dispute as to his qualifications), they must be satisfied beyond a reasonable doubt that he was not twenty-one years of age at the time he took the oath charged in the indictment." The court refused to give either of these charges, and defendant duly excepted.

The charge given and the refusal to charge as requested are now assigned as error, as also that the record does not show that the jury was properly sworn. The recitals of the record on this point are stated in the opinion.

GOODE & TONEY, for appellant. — The oath administered to the jury was not sufficient. *Johnson v. The State*, 47 Ala. 9. The election law, section 34, prescribes how and by whom the challengers are to be appointed, and proof of the appointment can be made only by showing a compliance with that law. The charge of the court, however correct it may be when applied to common law perjury, was misleading and erroneous when applied to the statutory crime. Under the statute the oath must be wilfully and corruptly *false*, the facts stated must be *untrue*, before any offence is committed. If the facts sworn to existed, how can reckless swearing to them convert them into *falsehoods*?

JOHN W. A. SANFORD, Attorney General, *contra*. — The oath administered was sufficient. *Lockett v. The State*, 47 Ala. It was perfectly competent for the witnesses to testify that they were challengers. *Jacob v. United States*, 1 Brockenbrough, 520; 4 Term Reports, 366.

MANNING, J. — 1. The objection to the oath administered to the jury that tried defendant is not well taken. The record recites that they were "duly sworn according to law, to try the issue joined," &c., which is sufficient. The record does not purport to set forth the oath at length as administered.

2. There was no error in allowing the persons who acted as challengers on election day to prove that they were such, and received notice of their appointment from the sheriff, orally. A challenger receives his appointment but for a day; the sheriff of whom he received the notice was one of the officials authorized to make the appointment; no record evidence of this is required to be kept; and if a challenger fails to attend at the polls, the inspectors can designate another person to take his place. Section 34 of "Act to regulate elections in the State of Alabama," approved April 22, 1873.

In *Jacob v. The United States* (1 Brock. 520), concerning the authority of a certain person, as collector of revenue, to

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cause a seizure of the property of a distiller, for violation of the law, Chief Justice MARSHALL, after consideration, held that proof that he had been and was acting as such officer was sufficient. "That he has acted notoriously as a public officer has been deemed," says Chief Justice MARSHALL, "*prima facie* evidence of his character, without producing his commission or appointment."

3. The judge of the city court erred in not giving to the jury the written charges asked on behalf of defendant, and numbered 1, 2, 3, and 5, respectively. The accused was charged with perjury, and the only particular, as the evidence shows, in which his oath was impeached, was in the question of his age, whether or not on election day he was twenty-one years old. If the jury believed from the evidence that he was twenty-one years old, they should not have found him guilty upon the imagination or belief that he was recklessly swearing to what he did not know or believe. In this prosecution, he should not have been convicted, if the oath he had taken was not false in fact.

4. There was no error in refusing charge numbered 4. That defendant did not vote after taking a false oath to enable him to do so, might be considered in mitigating the penalty, but does not entitle him to a verdict of acquittal.

The judgment of the court below is reversed and the cause remanded. The prisoner will be kept in custody until discharged by due course of law.

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Proceeding under the Statute for Bastardy.

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1. *Imprisonment for debt; what is not within meaning of the Constitution.* — The sections of the Revised Code which require the imprisonment of the putative father in bastardy proceedings, if he fail to give bond for the support of the child, are not violative of the constitutional inhibition against imprisonment for debt.

2. *Paternity of child; what evidence relevant on issue as to.* — The issue being as to the paternity of the bastard child, the defendant may prove that the child bears no likeness to him, or that it resembles another man who had opportunities of illicit intercourse with the mother; but proof that the child resembled the children of another man, without showing in what particular, or that such children resembled their father rather than their mother, is too vague and indefinite and is properly excluded.

APPEAL from Circuit Court of Randolph.

Tried before Hon. JOHN HENDERSON.

This was a proceeding against appellant under the statutes for bastardy. On the issue before the circuit court as to the paternity of the child, the mother testified that appellant was its father. The defendant then introduced a witness who testi-

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fied that he "had seen one Clark Messmer with the prosecutrix on two occasions since the commencement of the prosecution, and that both times they were going in the direction of the court-house;" that he had seen the bastard child and "*that it favored Clark Messmer's children.*" To the italicized portion of this testimony the State objected, and the court thereupon excluded it from the jury.

The jury having found the issue against defendant, and he being unable to give bond, the court sentenced him to jail as the statute requires. The defendant, denying the power of the court under the Constitution to make such order, objected and excepted to the sentence.

WILLIAM H. SMITH, for appellant. — I. Under the Constitution there can be no imprisonment for debt. None of our laws make bastardy a crime. The proceedings authorized by the statute are not criminal. The governor cannot pardon the defendant. If the parties marry, or the child dies, the proceeding abates. It is a mere proceeding, then, to enforce the performance of a *civil duty* in behalf of a *particular individual*, in other words, a debt. No statute makes it a criminal offence to refuse to give the bond. The case against defendant is not required to be made out beyond a "reasonable doubt." Everything shows that it is a mere civil proceeding.

II. Proof to show the probability of another guilty agent is always admissible. The evidence, however weak, cannot be excluded if it has a tendency to prove the issue. Brickell's Digest, 809, § 82. That the proof offered was admissible on an issue of paternity, see LORD MANSFIELD in Douglas's case, Wills on Circumstantial Evidence.

JOHN W. A. SANFORD, Attorney General, *contra*.

BRICKELL, C. J. — A proceeding under the statutes to compel a putative father to the support and education of a bastard child, during the helplessness of mere infancy, has some of the characteristics of a civil action and of a criminal prosecution. It is commenced by a complaint on oath, on which a warrant of arrest issues in the name of the State. A preliminary examination is had before a justice of the peace of the county in which the woman is pregnant or delivered of the child, and if sufficient evidence appears, the accused is recognized to appear at the next term of the circuit court. If he fails to enter into the recognizance with sufficient sureties, he is held in custody. Entering into the recognizance and failing to appear in obedience to it, a forfeiture is incurred, and a writ of arrest issues against him, as in criminal cases on indictment.

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On his appearance in the circuit court, an issue is made up to which he and the State are the parties, to ascertain whether he is the real father of the child. If this issue is found against him, judgment is rendered against him for the costs, and he is required to give bond and security payable to the State, conditioned for the payment annually, for the period of ten years, of such sums not exceeding fifty dollars a year, as the court may prescribe, for the support and education of the child. Failing to give the bond, the court renders a judgment against him of necessity, in the name of the State, for such sum as at legal interest will produce the sum he is required to pay yearly, and "he must also be sentenced to imprisonment for one year, unless in the mean time he execute the bond required, or pay the judgment and costs." R. C. §§ 4396-4406. The proceeding is certainly penal in its character, if not strictly criminal. On the trial in the circuit court the accuser and accused are alike competent witnesses. It can be commenced only on the complaint of the mother. No indictment or presentment by a grand jury is necessary to support it. It abates on the death of the child, and the marriage of the mother and putative father vacates the proceeding, though it has progressed to final judgment. It is a penal proceeding, intended to relieve the State from the duty of maintaining the illegitimate child, rather than to inflict punishment for the violation of law. It is founded on the hypothesis, that it is a duty due to society from the putative father to maintain and educate his illegitimate child, and the purpose is to compel performance of this duty. *Judge of County Court v. Kerr*, 17 Ala. 328; *Satterwhite v. State*, 28 Ala. 65.

The constitutional inhibition of imprisonment for debt is not infringed by the imprisonment of the putative father if he fails to execute the bond required of him on conviction. He is imprisoned not for the failure to pay a debt, but for his failure to perform a duty — a duty enforced in the name of the State, for the protection of the State.

On an issue formed in a bastardy proceeding, it is doubtless competent for the defendant to prove that the child bears no likeness or resemblance to him, or that it resembles some other person, who had opportunities of illicit intercourse with the mother. This was not the kind of evidence offered by the appellant. The proposition was to permit a witness to state the bastard child favored the children of another man. It was not proposed to show these children favored their father. A child often resembles only his mother, and has none of the distinguishing features or physical peculiarities of the father. Nor was it offered to show what were the particulars in which the bastard resembled or favored the children of the person named.

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It was the mere opinion of the witness that the children did bear a resemblance. There is nothing about which the opinions of individuals differ so widely as personal likeness or resemblance. One discovers it, where another, instead of finding traces of it, finds distinctive marks of opposition. The evidence was too vague and uncertain — too inconclusive in its nature, to have gone to the jury. It could not have exerted any legitimate influence on the verdict they were required to render. In the case of *Commonwealth v. Webster* (5 Cushing, 302), it was material for the defendant to show that the person he was charged to have slain was in life after a particular hour of a certain day. Witnesses were introduced who testified they saw him in various places in Boston after that hour. To rebut this evidence, it was proposed to show there was a person about the streets of Boston, at that time, who bore a strong resemblance to the deceased in form, gait, and manner, and had, by persons acquainted with the deceased, been approached and spoken to, for the deceased. The evidence was rejected as too remote and unsatisfactory. This evidence seems to us more remote and unsatisfactory, and was properly rejected.

The judgment is affirmed.

Daniel & Wife v. Hill & Wife.

Bill in Equity to set aside Probate of Will.

1. *Testamentary capacity as to personality.* — Testamentary capacity as to personality is governed by the law of the last domicil.
2. *Domicil of minor; how arises and changes.* — The domicil of the minor follows and changes with that of the parents, and if the father dies, his last domicil is that of the infant children.
3. *Same; guardian cannot change.* — The guardian cannot change the domicil acquired by the ward at the place of his birth, or derived from his father at his death.
4. *Same; testamentary capacity of ward; what law fixes.* — A ward whose parents died domiciled in Alabama, where letters of guardianship of his person and estate had been granted, does not lose or change his domicil here, because he accompanies his guardian, on his change of residence, to another State; and the ward dying testate in the latter State, his testamentary capacity must be measured by the laws of Alabama.
5. *Same; recital as to, not conclusive.* — A recital in a will that the testator is of a particular place, is never conclusive as to domicil, and may be rebutted by proof of the actual domicil.
6. *Will; essentials of.* — It is of the essence of a will that it be ambulatory and revocable in its nature during the life of the testator. An instrument possessing these characteristics, fairly apparent from the face of it, no matter how irregular in form or inartificial in expression, or by what name designated, must have effect as a will.
7. *Will; what instrument is.* — A written instrument was as follows: "Know all men by these presents, that I, R. D. M. . . . do for the love I have for my uncle A. S. D., and my aunt M. A. D., if I do not live to be twenty-one years of age, I give to them all the money I have in the hands of my uncle A. S. D., who is my guardian, to have and to hold as theirs forever, their assigns, &c., the record

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of which is in the probate court of Greene county, Alabama. In witness whereof I have set my hand and seal, this March 10th, 1869. R. D. McAlpine. [L. S.]" It was properly attested by two witnesses: *Held*, a will, not a deed.

8. *Confidential relations between testator and legatee; what imposes on proponent of will.*—The existence of confidential relations between the testator and legatee or devisee excites the suspicion and jealousy of the court, and casts upon the proponent of the will the duty of showing, by affirmative evidence, the testator's capacity, volition, and free agency.

9. *Same; when will established, notwithstanding.*—When all suspicious circumstances are explained, all legitimate inferences of undue influence repelled, and all doubts and presumptions, generated from the confidential relation, cleared away by affirmative evidence, which satisfies the conscience of the court of the capacity of the testator, his knowledge of the contents of the will, and its expression of his spontaneous intentions, the will is valid; and this, notwithstanding the confidential relations between the testator and the person drawing the will, who takes the principal or sole benefit under it.

10. *Same.*—In this case a will drawn by the guardian, and executed only in the presence of his immediate family, by which his nephew and ward bequeathed to the guardian and his wife all the ward's property then in the guardian's hands, in exclusion of a sister of the whole and one of the half blood, was sustained. The court reviewing at length the evidence, which clearly showed the testator's capacity, repelled all suspicion of undue influence, and established that the testator's disposition of his property was in accordance with the state of his affections, and clearly expressed his spontaneous intentions.

11. *Chancellor's decree on facts; when reversed.*—The chancellor's decree on controverted facts will not be disturbed unless it clearly appears that he has erred. When the decree is in opposition to material testimony not controverted, it cannot be allowed to stand; the error then being not an error of fact, but as to the legal effect of facts not disputed.

APPEAL from Chancery Court of Greene.

Heard before Hon. A. W. DILLARD.

The bill in this case was filed by the appellees to set aside the probate of the will of Robert D. McAlpine. The appellee, Mary E. Hill, was the only sister of the full blood of the said Robert D., who died in March, 1869, between eighteen and nineteen years of age, unmarried, and leaving no brothers. After his death the appellant, A. S. Daniel, procured to be admitted to probate, in the court of probate in the county of Greene, an instrument in writing, as the last will and testament of the said Robert D., in the terms following: "Enterprise, Miss., March 10th, 1869. Know all men by these presents, that I, R. D. McAlpine, of the county of Clark, State of Miss., do for the love I have for my uncle A. S. Daniel, and my aunt M. A. Daniel, if I do not live to be twenty (21) one years of age, I give to them all the money I have in the hands of my uncle, A. S. Daniel, who is my guardian, to have and to hold as theirs forever, their assigns, &c., the record of which is in the probate office of Greene Co., Ala. In witness whereof I have set my hand and my seal, this March 10th, 1869.

"R. D. McALPINE. [Seal.

"Witnesses:

"M. E. Reinhardt.

"H. M. Etherington."

The material facts appearing in the record are: that the

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parents of Robert D. McAlpine died in 1857, leaving him an infant, but a few months old. Mrs. Daniel was his paternal aunt, and at the request of his parents, took the care and control of him. He remained under their roof, as a member of their family, receiving from them parental care and affection, recognizing them as his parents, until his death on the 30th of March, 1869. In 1857, A. S. Daniel was appointed by the court of probate of Greene county guardian of the person and estate of the said Robert D. In February, 1868, he made with said court his last annual settlement as such guardian, by which a balance exceeding \$6,000 was ascertained to be due from him to his ward. The testator, Robert D., died of pulmonary consumption, and was sick for about four months prior to his death. For about six weeks before his death he was confined to his room, and the greater part, if not all the time, to his bed. At the execution of this testamentary paper he was very feeble and emaciated. The evidence of his testamentary capacity at that time and to his death, is full and uncontradicted. The will was written by A. S. Daniel, the guardian, in the room of the testator, when no one was present but his wife, the aunt of the testator, and other members of the family of the guardian. After the will was written, it was handed by Daniel to Mrs. Reinhardt, his sister, and one of the attesting witnesses, who having read it handed it to the testator, who read and then signed it, and it was attested by the subscribing witnesses.

The bill seeks to set aside the probate of the will, on allegations of fraud and undue influence practised in its procurement by Daniel and his wife ; and on the ground that the domicile of the testator, when the will was made, and at his death, was in the State of Mississippi, and the laws of that State did not confer upon him testamentary capacity. The cause was heard on pleadings and proofs, and the chancellor being of opinion the allegations of undue influence were sustained, rendered a decree annulling the probate. From that decree this appeal is taken. The other facts of the case are reviewed in detail and at length in the opinion.

J. B. CLARK and T. C. CLARK, for appellant. — In *Barry v. Butlin* (1 Curtis' Ecclesiastical Reports), Lord BROUGHAM lays down the rule that the *onus probandi* lies upon the party propounding the will ; and he must satisfy the court that it is the spontaneous act of a free and capable testator. If the party writes or propounds a will under which he takes a benefit, this engenders suspicion and distrust, calling on the court to be vigilant and jealous in examining the evidence in support of the will, and if this is sufficient to satisfy the conscience of the court and remove the suspicion, the will must stand.

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The presumption against the will does not become conclusive because the will was written by the sole legatee who was guardian of the testator. *Durling & Parker v. Loveland*, 7 Ecclesiastical Reports, 92; *Potter v. Allison*, 7 Humphreys, 325; *Downey v. Murphy*, 1 Dev. & Bat. (Law) 82; *Hill v. Boyd*, 12 Ala. 694. The fact that a will is made in conformity to a fixed determination is strong evidence of capacity. *Couch v. Couch*, 7 Ala. 524. The making of the will cannot be assimilated to the making of contracts or the passing of gifts between *cestuis que trust* and trustee. *Lampert v. Lampert*, 1 Vesey Jr. 20. The influence and control acquired over others, the sole result of acts of kindness, the natural deference given to manly character, the feeling of affection which springs from association with the upright and lovable, cannot constitute undue influence. *Hall v. Hall*, 38 Ala. 131; *Gilbert v. Gilbert*, 22 Ala. 532; *Leveretts v. Carlisle*, 19 Ala. 80; Williams on Ex'rs, 39.

The facts of this case acquit appellants of all suspicion. They present the case of a will made in pursuance of a long expressed intention, at a time when the intellect was clear, in accordance with the dictates of affection, reason, and justice. They show that the will was read to the testator and adopted by him. The kindred who did not share in the disposition of his property were not lost sight of, but the testator deemed it just that they should not share his bounty. To whom better could he leave his property, soon to be of no value to him, than to appellants? They took him while a helpless infant and reared him almost to manhood. With unwavering affection they sheltered him through life, and with unselfish love watched him as a child of their own, soothing his last hours with parental kindness. Where better could the grateful heart of the youth bestow, what was no longer of value to him? Where else should his love and affection have rested? A careful scrutiny of the circumstances attending the making of the instrument will show that it was the free, intelligent choice of an unclouded intellect, disposing of property, in accordance with a long intended purpose, to those whose influence over him was born of no acts save of unwavering affection and parental kindness. Cases less strong than this have been upheld by the highest court of England. *Arnold v. Earle*, 6 Ecclesiastical Reports, 230.

SNEDICOR & COCKRELL, and CHARLES COOKE, *contra*.—The question is not whether the chancellor's decree is right, but whether it is *manifestly* wrong. 45 Ala. 415; 46 Ala. 318; 39 Ala. 63; 30 Miss. 313. The burden is on appellants to show the validity of the will; a double burden when the

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guardian writes it, he being the sole sharer in the bounty of his ward. Suspicion and distrust are engendered by such transactions. The ground on which a court of equity proceeds in condemning such acts is "not on the ground of positive fraud, but from motives of general public policy." *Meek & Thornton v. Perry*, 36 Miss. 190. The general doctrine is that "a court of equity will, upon grounds of public policy, set aside any gift made by a ward to his guardian during the continuance of the relation, or shortly thereafter, without any proof of actual fraud, upon the presumption that it was obtained by undue influence." *Ingram v. Wyatt*, 1 Haggard, 384; *Wells v. Middleton*, 1 Cox, 112; *Hylton v. Hylton*, 2 Vesey Sr. 547; 9 Vesey, 295; 3 Mylne & Keen, 113; Kerr on Frauds, 177; 2 Leigh, 11. The only modification of the rule here is that this presumption is not conclusive; but strong testimony must be produced to countervail it. 5 Vesey, 678; 5 Ala. 90. The general doctrine is that all such contracts, whether by deed or will, are void unless the *bona fides* is shown by the most powerful evidence. *Breed v. Pratt*, 18 Pickering, 115, per SHAW, C. J.; *Meek & Thornton v. Perry*, 26 Miss. 252; *Morris et ux. v. Stokes*, 21 Ga. 552. That the general doctrine of the incapacity of the ward to contract with the guardian is applicable in all its force to a will, is fully settled and put at rest in this country. *Morris et ux. v. Stokes*, 21 Ga. 575; *Breed v. Pratt*, 18 Pick. 115; *Meek & Thornton v. Perry*, 36 Miss. 252; *Ingram v. Wyatt*, *supra*; *Pattison v. Allison*, 7 Humph. (Tenn.) 384. *McCartney v. Bone & Wife*, 33 Ala. 601; 37 Ala. 556; 31 Ala. 304. See also as peculiarly in point 12 Ala. 694; 5 Ala. 90; Ib. 81. By the removal of the ward and his estate the domicile of the ward was changed. 5 Pickering, 26; 18 Ga. 5; 2 Kent's Commentaries, 227, note C; Rev. Code, § 2441. The instrument sought to be probated is not a will, but a deed. The words are appropriate to convey a present interest. This interest is to be "defeated" only by one contingency, the living of the grantor until he is twenty-one years of age. There is the absence of a single expression imparting to the instrument a "testamentary" character, and all comport with a deed. "To have and to hold" are words of testamentary disposition, and the instrument conveys or passes money on hand designated as *then* being in the hands of the guardian. These characteristics distinguish it from *Gilham v. Mustin*, 42 Ala. 365. The recital in the will as to residence estops the legatees. 8 Ala. 543; Bigelow on Estoppel, 297. The evidence shows a studious concealment about the making of the will, and systematic attempts to remove and cut off the ward from the intercourse and influence of his nearest relatives. The circumstances attending the

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execution of the will, the character of the witnesses to it, the near friends and kindred not being present, all show a disposition to shut out the testator from the presence and counsel of impartial and disinterested friends and advisers. The testator was weak in body and feeble in intellect. The evidence clearly establishes that the will was obtained by undue influence. To say the least of it, it is entirely insufficient to rebut the presumption which the law is compelled to draw from the facts.

BRICKELL, C. J. — It certainly is now a settled principle prevailing in this country, without exception so far as we can ascertain, that testamentary capacity, as to personalty, is governed by the law of the last domicile; as to realty, by the *lex rei sitæ*. Whart. Con. Laws, § 568; Story's Con. Laws, § 465; *Varner v. Bevil*, 17 Ala. 286. The important rules which are generally adopted as guides in determining the domicile, when it is in doubt, are thus stated by Judge STORY: "First, the place of birth of a person is considered as his domicile, if it is at the time of his birth the domicile of his parents. Secondly, the domicile of birth of minors continues until they have obtained a new domicile. Thirdly, minors are generally deemed incapable *proprio Marte* of changing the domicile during their minority, and therefore they retain the domicile of parents; and if the parents change their domicile, that of the infant children follows it; and if the father dies, his last domicile is that of the infant children." Story's Con. Laws, § 46. It is settled in this court that a guardian cannot change the domicile taken by his ward at the place of his birth, or acquired from the father at his death. *Johnson v. Copeland*, 35 Ala. 521. The testator was born in this State; his parents had their last domicile here, and guardianship of his person and estate were granted by a court of this State. Though he accompanied his guardian to Mississippi, on his change of residence to that State, he retained the domicile of his birth, and his testamentary capacity must be measured by the law of this State. The recital in the will, that the testator is of "Clark county, Mississippi," does not estop the appellants from showing his domicile was in Alabama. Such a recital is never conclusive, but may always be rebutted by proof of actual domicile. Whart. Con. Laws, § 61; *Gilman v. Gilman*, 52 Me. 177; *Whicker v. Hume*, 5 Eng. Law & Eq. 52.

There is much contrariety of statement among common law writers as to the age at which persons were capable of disposing of personal estate by will. Lord COKE states the age to be eighteen, others seventeen. There are *dicta* of chancellors that fifteen is the age for males, if sufficient discretion appears;

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and some have doubted if twenty-one was not the earliest period. Modern Probate Wills, 15. Modern writers generally, conforming to the rule of the civil law, state that males of fourteen, and females of twelve, had testamentary capacity as to personal estate. Redf. on Wills, 15; 1 Jarm. on Wills, 29; 1 Williams on Ex'rs, 14. The tendency of recent legislation, in England and in this country, has been by statute to prescribe the age. The statute of this State, not distinguishing between males and females, prescribes twenty-one as the age at which capacity to devise real estate shall be imputed; and eighteen as the age at which personal property may be bequeathed. R. C. §§ 1910-1916. Whether a will disposes of real or personal property, it must be signed by the testator, or some person in his presence and by his direction, and attested by at least two witnesses, who must subscribe their names thereto in the presence of the testator. R. C. § 1930.

The instrument propounded as the will of the testator was signed by him after he had attained the age of eighteen years, and was attested by two witnesses as the statute requires. It is argued the instrument is a deed and not a will. A will is defined to be an instrument by which a person makes a disposition of his property to take effect after his decease, and which is, *in its own nature*, ambulatory and revocable during his life. It is this ambulatory and revocable quality which forms the characteristics of a will. True, a deed or other instrument may postpone the possession, or the enjoyment, or the vesting, and may not, therefore, be fully effectual until the death of the grantor or the maker; but this is the force of its express terms, and does not result from the legal nature of the instrument. A deed may be so framed that the grantor reserves to himself use and possession during his life, and on his death create a remainder in fee in a stranger. Immediately on the delivery of the deed, the remainder vests in title, and is postponed only in enjoyment. A devise to the stranger would create no interest whatever until the death of the testator. The remainder created by the deed would be irrevocable by the grantor, and by no subsequent grant or conveyance could he defeat it. The devise is revocable at the pleasure of the deviser; and is revoked by a subsequent grant or devise to another. 1 Jarm. on Wills, 13. It is not requisite to the validity of a will that it should assume any particular form, or that it should be couched in language technically appropriate to its testamentary character. However irregular in form or inartificial in expression it may be, if it discloses fairly the intention, that the destination of the property on which it operates is posthumous only, it is not material what title or designation may be given it. 1 Jarm. on Wills, 14. Instruments entitled deeds-poll, or indentures,

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or articles of agreement, which substantially made testamentary dispositions, have often been deemed wills only, of which probate was necessary to their operation. This instrument purports to be sealed, and bears rather the form of a deed, but in its language has no words of grant or conveyance. Its words are of gift only, expressing a disposition of personal property to take effect in the event of death before the testator arrives at the age of twenty-one years. The death of the testator alone can operate to create any interest in the donee, and it is of consequence a will. *Dunn v. Bank of Mobile*, 2 Ala. 152; *Shepherd v. Nabors*, 6 Ala. 631; *Gilham v. Mustin*, 42 Ala. 365.

The capacity of the testator is not impeached. Though he was in declining health, and lingered under the disease from which he was suffering when the will was made until his death, twenty days thereafter, his intellect does not appear to have been at any time clouded or enfeebled. In ordinary cases, testamentary capacity not being doubtful, it is not necessary for the proponent, in the first instance, to offer evidence of the testator's knowledge of the contents of the will. This is inferred from publication and execution. *Hill v. Barge*, 12 Ala. 687; 1 Jarm. on Wills, 47; Shelford on Lunatics, 421; *Carr v. McCasum*, 1 Dev. & Bat. (Law) 276; *McNinch v. Charles*, 2 Pick. 229. The legal presumption in such cases is always in favor of the will; and he who seeks to impeach it must clearly show that the testator was imposed on, or that there was some mistake whereby he was deceived. *Day v. Day*, 2 Green's Ch. (N. J.) 549; *Pevus v. Bingham*, 10 N. H. 514. When the will is written, or procured to be written, by a person who is a principal beneficiary under it, and who stands in a confidential relation to the testator, favorable to the exercise of undue influence, the presumption and *onus probandi* are against the instrument, and he must satisfy the conscience of the court that the testator had knowledge of the contents of the will, and voluntarily executed it. *Hill v. Barge, supra*; 1 Williams on Ex'rs, 91; 1 Jarm. on Wills, 42-45; Shelford on Lunatics, 414; *Raworth v. Mariott*, 1 Mylne & Keen, 643 (7 Eng. Ch. 205); *Ingram v. Wyatt*, 3 Eng. Ecc. 166; *Wrench v. Murray*, 7 Ib. 525; *Butlin v. Barry*, 6 Ib. 406.

This will was written by Daniel, and he and his wife are its only beneficiaries. He was the guardian of the testator, who, from early infancy an orphan, had been reared and lived under his roof, as a member of his family. The will was written and executed in the testator's last illness, but twenty days before his death, when recovery was doubtful, if not hopeless. Its execution was in the presence only of the family of Daniel, and when the testator had not access to, or intercourse with the re-

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lations who, by law, would have succeeded to his estate. These are all facts militating against the fairness and validity of the will, exciting the jealousy and vigilance of the court, and requiring clear and satisfactory evidence of capacity, volition, and that the testator knew the contents of the will. 1 Wms. Ex'rs, 96; 1 Jarm. on Wills, 42-47.

By the civil law, if a person wrote a will in his own favor, the instrument was rendered void, in conformity to an ordinance under Claudius, that the writer of another's will should not mark down a legacy to himself. *Vreeland v. McClelland*, 1 Brad. Sur. Rep. 420. No such rule prevails in the English ecclesiastical courts, from which we have borrowed the general principles determining the validity of wills of personal property. In such case, these courts have asserted only that evidence of publication and execution will not authorize probate, as it will when the capacity is not doubtful, and the opportunity afforded for imposition, by the writing of the will by one taking a benefit under it, does not exist; or when there are not circumstances of suspicion against the fairness of the will developed by evidence. *Ingram v. Wyatt*, *supra*; *Butlin v. Barry*, *supra*; *Raworth v. Mariott*, *supra*; *Hill v. Barge*, *supra*. In the case of *Barry v. Butlin*, *supra*, on appeal to the privy council, Baron PARKE carefully and critically examined the decisions in the ecclesiastical courts, and says: "The rules of law, according to which cases of this nature are to be decided, do not admit of any dispute, so far as they are necessary to the determination of the present appeal; and they have been acquiesced in on both sides. These rules are two: the first, that the *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator.

"The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the court, and call upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favor of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased." Again: "All that can be truly said is, that if a person, whether attorney or not, prepares a will with a legacy to himself, it is, at most, a suspicious circumstance of more or less weight, according to the facts of each particular case; in some of no weight at all, as in the case suggested, varying according to circumstances; for instance, the *quantum* of the legacy, and the proportion it bears to the property disposed of, and numerous other contingencies; but in no case

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amounting to more than a circumstance of suspicion demanding the vigilant care and circumspection of the court in investigating the case, and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intention of the deceased. Nor can it be necessary that, in all such cases, even if the testator's capacity is doubtful, the precise species of evidence of the deceased's knowledge of the will is to be in the shape of instructions for, or reading over, the instrument. They form, no doubt, the most satisfactory, but they are not the only satisfactory description of proof by which the cognizance of the contents of the will may be brought home to the deceased. The court would naturally look for such evidence; in some cases it might be impossible to establish a will without it, but it has no right in every case to require it." In *Raworth v. Mariott*, *supra*, it is said: It must not be understood that direct evidence of the testator's knowledge of the contents of the will is necessary; circumstantial evidence may be sufficient for that purpose. In *Durling v. Loveland*, 2 Curtis, 225 (7 Eng. Ecc. Rep. 92), the court reviewing the judgment of Baron Parke, in *Butlin v. Barry*, *supra*, pronounces as the rule on which the ecclesiastical court has proceeded, when a will is drawn by a person standing in a confidential relation to the testator, who takes a considerable benefit under it, that it is not necessary to prove the will was read over to the testator, or instructions given for its drawing, but that the court must be satisfied the will expresses the real intentions of the testator. The authorities in this country assert the same doctrine. Affirmative evidence, in any legal mode, that the will expresses the spontaneous intentions of the testator, satisfies the court, and removes the unfavorable presumptions which would otherwise be indulged. *Crispell v. Du Bois*, 4 Barb. 393; *Downey v. Murphey*, 2 Dev. & Bat. 82; *Patton v. Allison*, 7 Humph. 320.

The evidence in the record, without conflict, traces the history of the testator from his birth to his death. His parents died in 1851, when he was about six months of age, and they committed him to the care of Mrs. Daniel, the sister of his father, who was childless. His only immediate relatives were a sister of the whole and one of the half blood. These were older than he, and orphanage estranged them from all but mere casual intercourse. They do not appear ever to have resided under the same roof, or to have been members of the same household. It is not strange then that he never manifested for either of them the affection he would have borne to the sisters who had shared with him a common parental care and love. The uncle and aunt to whom his dying parents intrusted him in infancy watched over him, and bestowed upon

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him the care and affection they would have given to the child of their marriage; and he repaid it with filial obedience and love. The one he spoke of as his father, never applying to him any other name; to the other he gave the childish yet endearing appellation of *Niny*. To his grandmother, — perhaps the last time he saw her, for they seem to have resided some distance from each other, — a year or two before his death, he speaks of the unvarying kindness and affection of his uncle and aunt, the only parents he had ever known, and declares if he should live to be a man they should never want for anything. To the witness Roberts he declared several times before his last illness, and when his health was not good, that in the event of his death he wished *his Pa and Niny should have his property*; and when reminded of his sister, the appellee Mrs. Hill, said, *she had drawn her part, and had a husband to take care of her*, — meaning, as we suppose, that she had shared equally with him in an inheritance from their parents. The will, on undisputed evidence, is then in consonance with the state of his affections, and in conformity to the only testamentary declarations he is proved ever to have made. If the pecuniary condition of his sisters was such as to have appealed directly to his sympathies, or to have excited his benevolence, no evidence of the fact is given, nor that he had knowledge of it. Apart from all evidence of his testamentary declarations, it would naturally be expected that the uncle and the aunt, who had stood from his infancy in the relation of father and mother to him, whose kindness and affection knew no varying or change, would be the recipients of his bounty, rather than the sisters with whom he had never been associated.

The will is drawn at his solicitation, is read over to him, and handed to him to read, and is signed by him, while able to sit up in his bed, and at his request is attested by two witnesses in his presence. These facts certainly furnish all the evidence, that the most jealous and vigilant court could demand, that the will expresses the spontaneous intentions of the testator, and that he had full knowledge of its contents. Whatever unfavorable presumptions could be drawn from the fact that the writer and his wife are the sole beneficiaries, and that the will was written and executed in the presence only of members of his family, are all repelled. Much stress is laid in the argument of counsel on the fact that the will was witnessed only by members of Daniel's family. If the capacity of the testator was doubtful, if there was any evidence of concealment or secrecy about the transaction, if he had resided so long at the place where the will was made as to have formed an intimate acquaintanceship without the family circle, the fact would be of more importance. But in no event could it be regarded as

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important, when confronted with such clear and undisputed evidence of capacity and spontaneity as the proponent has introduced, and which is not controverted.

It is also insisted that proper medical attention was not furnished the testator. The evidence does not support the accusation; and it seems to us rather harsh, if not cruel, when the boy's whole life had been marked by the care of the uncle and aunt, which he never failed to acknowledge dutifully and affectionately, and when his corpse was borne from her roof, she was writhing in convulsions of grief, endangering her own life.

It is said there was a studied effort to cut the testator off from communication with his nearest relations before and after the execution of the will. The evidence does not lead us to this conclusion. That Mrs. Daniel advised her brother, the uncle of the testator (residing near the sister, Mrs. Hill) of the testator's illness, is distinctly proved. The grandmother says that Mrs. Hill was informed of it. Whether she was or not, the fact of the communication repels the accusation of a studied effort to conceal his illness. The testator was sick for four months, during all which period the sisters make no inquiries for him or about him. It is not matter of reproach to them, but the fact is significant of the character of intercourse existing between them.

It is again urged that the ward's whole estate consisted of moneys in the hands of Daniel amounting to more than six thousand dollars, that he was looking in dread to the testator's maturity, as the day of settlement; and that he had therefore a strong motive to procure the will, which would operate as a release from liability. The weight of this fact has not been overlooked. Daniel was appointed guardian in 1857, when the ward was about six years of age. The entire estate of the ward consisted of money amounting in February, 1859, on the first annual settlement, to about forty-four hundred and seventy dollars. Regular annual settlements are made by the guardian to February, 1869, when we find the ward has been supported and educated and his patrimony increased to six thousand two hundred and sixty dollars. These settlements bear internal and conclusive evidence that the guardian honestly and faithfully has discharged his duty in the management and improvement of the ward's estate. It is unfortunately too often true, that a ward's patrimony, if not larger than this, diminishes rather than increases in the hands of guardians; the expenses of maintenance and education exceeding the income, and trenching gradually on the capital. It does not appear that Daniel would have been at all embarrassed by meeting this liability on his ward's maturity, and he certainly never avoided, promptly and annually to place on the records of the proper

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court clear and conclusive evidence of its extent. Is it fair or just, is it charitable or lawful, in the face of these facts, and of the convincing evidence that he had never faltered in his affection for the testator, to indulge the presumption that, to avoid this liability he, by force or by fraud, extorted this will? When we say force, of course we mean only the moral coercion which the law denominates undue influence. We feel assured that the history of his guardianship as it is written in this record, and of his connection with the testator as it is disclosed by the evidence, acquits him of the suspicion.

It is most ably argued, that although the evidence may establish capacity, and may not establish fraud or undue influence in the procurement of the will, so clearly that its validity could be questioned, if no confidential relation had existed between the testator and the beneficiaries, yet its probate should be annulled, upon the general doctrine that courts of equity adopt on principles of public policy, in reference to all gifts made to or contracts made with a guardian, during the continuance of the guardianship. The principle is fully recognized, and the importance of a rigid adherence to it properly appreciated. It cannot be applied in its full force to testamentary donations, though in these demanding from the court vigilance, and from the donees clear evidence of the capacity of the donor, of spontaneity and free agency in the execution of the gift. A testamentary donation not taking effect until the death of the testator, until he is incapable of the use and enjoyment of the subject of the gift, and it must devolve in title, use, and enjoyment to another, either by his disposition or operation of law, the reason of the principle does not fully exist. It may be just and proper for him to give, and fair and honorable for the donee, in that event, to accept benefits which could not in life have been prudently dispensed, or in good faith received.

Whatever may be his condition in life, a just father would not permit a son, just entering manhood, to strip himself of his fortune, and become the recipient of it. Yet if the son were dying, it might be his highest moral duty to bestow his fortune on the father, and the father, without the imputation of selfishness, could accept it. So, if a ward just reaching emancipation should materially diminish his fortune by a gift to his guardian, the transaction would *prima facie* import folly on the one hand and fraud on the other. But if the ward were dying, and his property ceasing to be of value to him, except in his power of disposition, he should make a testamentary donation to his guardian of a part or the whole of his estate, because of the guardian's kind offices in the helplessness of his infancy and childhood, and no improper influence has been exerted, who can say that the ward should not give, nor the guardian re-

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ceive? Whatever may be said of the wills of worldlings, whom avarice has hardened, or age chilled, the will of a generous youth is the offspring of his affections, and when these have not been practised upon it should be sustained. 3 Lead. Cases in Eq. 145, top p. That he may have the capacity of gratifying them, the law confers testamentary power over his personal estate.

The cases have gone very far in sustaining testamentary donations, when made to persons sustaining confidential relations to the testator, even when suspicious circumstances attended the transaction, and there was a deficiency of capacity. It would serve no good purpose to review them; they are generally cited in the recent writers on wills, though to some of them we will refer. In *Arnold v. Earl* (6 Eng. Ecc. 230), a will made by a minor of sixteen in favor of his guardian and schoolmaster, in whose house he lived, was substantiated. The will in the case of *Butlin v. Barry, supra*, was drawn by a solicitor, taking a considerable legacy, and legacies given to a medical man and brother of the deceased, to the exclusion of an only son. It was sustained on proof of capacity and knowledge of contents. In the case of *Crispell v. Du Bois, supra*, the will was drawn by the physician and confidential adviser of the testatrix, who was sixty years of age. He was a principal beneficiary, and her heirs were excluded. On proof of capacity and volition, and of unfriendly relations with her heirs, it was admitted to probate. In *Wyatt v. Ingram* (3 Hagg. 466; 5 Eng. Ecc. 183), a will of a testator of seventy-four years of age, drawn by the father of his attorney and agent, who was appointed executor, and almost universal legatee, and with whom the testator lived, was supported,—all unfavorable presumptions arising from the facts being rebutted and the capacity of the testator established. These authorities rest on the principle already announced, that the existence of confidential relations between the testator and legatee or devisee excites the vigilance and jealousy of the court, and casts on the proponent of the will the duty of showing by affirmative evidence the testator's capacity, volition, and free agency. When these appear the will must be supported.

We have examined with care the two cases, *Morris v. Stokes* (21 Geo. 552), *Meek & Thornton v. Perry* (36 Miss. 190), to which the counsel for appellees have referred. In each are features to be found not existing in the case now before the court, and which may have justified the conclusions reached. In the former case, the guardian had indulged the ward in reckless extravagance, in gross violation of his duty as a guardian, and thereby induced, as was supposed, the bequests to himself. This case and that have no features in

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common. In the latter case, the guardian and uncle of the testatrix, her principal legatee, entertained an unreasoning prejudice and an unmanly enmity to the testatrix's sister, which he had instilled, or endeavored to instil into the mind of the testatrix, and had made the continuance of his favor and affection depend on her participation in it. The pecuniary condition of the disinherited sister was such as to demand sympathy and relief, and the two sisters had been reared together, and were connected in associations and memory. No such facts exist in this case; and while we regard the law as correctly stated in the dissenting opinion of HANDY, J., and not in the opinion of the majority of the court, that case is so clearly distinguishable from this in its facts that it does not affect the conclusion we have reached.

The decree of the chancellor vacating the probate of the will is erroneous. There is no conflict in the evidence. The undisputed facts support the validity of the will. While we have announced our concurrence in the rule prevailing in this court that the decree of the chancellor on controverted facts will not be disturbed, unless it appears clearly that he has erred; when the decree is in direct opposition to the material testimony, which is not controverted, it cannot be allowed to stand. The error is then not an error of fact, but in the legal effect of facts not disputed. *Leeper v. Taylor*, 47 Ala. 221.

The decree of the chancellor is reversed, and a decree is here rendered dismissing appellees' bill, and they must pay the costs in this court and the court of chancery.

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Bill by Heir to recover Fund in Administrators' Hands.

1. *Demurrer, hearing of; to what confined.* — Since the adoption of section 3330 of the Revised Code the court is prohibited from hearing a demurrer to the bill for any cause not specially set forth.

2. *Same; what raises no question as to amendable defects.* — To assign as cause of demurrer to the bill that "it contains no equity," is not a compliance with this law, and raises no question as to any amendable defect.

3. *Demurrer for non-joinder of defendants; when properly overruled.* — A demurrer for non-joinder of parties defendant which does not specify those who should have been joined is rightfully overruled.

4. *Bill; what demurrable.* — A bill by the heir at law, to recover his share of a particular fund in the hands of the administrator of a solvent estate, is defective if it seek relief as to that fund only, and not a final settlement and distribution also. Such a bill, however, is not without equity, and if not assailed for its defects in the court below, the objection cannot be raised in this court.

5. *Set-off; what proper subject of.* — An heir sold certain cotton belonging to the Alabama estate to a third person who was to ship and sell it in New York. On its arrival there it was seized on legal process by the New York administrators. In a compromise with the purchaser, who threatened litigation, the New York

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administrators retained the cotton and paid the purchaser a sum of money on the heir's request to do so "and charge him in their administration account with the amount." It did not appear whether the New York administration had ever been settled, or whether there were any outstanding debts: *Held*, 1st. That the domiciliary administrator could not set off the sum paid by the New York administrator against the heir's claim to a share of the fund here. 2d. If equitable circumstances existed warranting the administrator here in making the charge, he could obtain relief only on cross-bill filed for that purpose. 3d. Mere unliquidated damages, arising out of a *tort* cannot be the subject of a set-off in equity.

6. *Decree for heir's share without refunding bond; when proper.* — It is not erroneous to decree an heir his share of a particular fund in the hands of an administrator, without exacting a refunding bond before coercing payment, when the administrator shows by his answer no reason why it is improper, and it appears that the estate is solvent, that all the other heirs have received their share, and there is no allegation of outstanding indebtedness.

7. *Account; when may be stated without reference.* — When the amount is not in controversy and nothing remains but a calculation of interest, the chancellor may, in his discretion, state an account without a reference to the register.

8. *Interest; when allowable in equity.* — As a general rule interest is always allowed in equity whenever it would be recoverable at law. A party complaining of the allowance of interest must show the special circumstances which render it improper.

9. *Damages on affirmance.* — The court declines to depart from the long established practice of awarding only five per cent. damages on affirmance of a judgment for payment of money, which has been superseded under section 3489 of Rev. Code.

APPEAL from Chancery Court of Russell,

Heard before Hon. B. B. McCRAW.

The facts are sufficiently stated in the opinion.

STONE & CLOPTON, for appellants.

SHORTER & WATTS, *contra*.

JUDGE, J. — James Wright, who was a citizen of the county of Russell, in this State, died intestate in the year 1864, leaving a large estate in said county both real and personal, and over one hundred thousand dollars in money in the hands of J. & D. Malcomsen & Co., of Liverpool, England. William H. Chambers (the appellant) and John Gill Shorter were appointed administrators of his estate, by the probate court of Russell county, and duly qualified as such; but the said John Gill Shorter afterwards departed this life, leaving the said Chambers the sole surviving administrator. During the administration of Chambers and Shorter they collected or received the amount of said fund in England, which, in the United States currency, amounted to the sum of one hundred and two thousand four hundred and fifty-seven and $\frac{8}{10}$ dollars. It does not appear that letters of administration were ever granted on the estate of the decedent in England; but the appellant Chambers states in his answer that the fund was recovered by him and Shorter, as administrators, "to be divided among the heirs at law of the intestate." Appellee, who was complainant below, is one of the heirs at law, and his share of

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said fund as such heir amounted, at the time it was received, to the sum of six thousand eight hundred and thirty and $\frac{1}{10}$ dollars. Soon after receiving the fund, the administrators proceeded to divide it among the heirs at law of the decedent, and paid to each one, except the complainant, his due proportion thereof; they refused to pay to the complainant his share, on the alleged ground that he was indebted to the estate in a sum as large or larger in amount than his share of the fund.

The claim of indebtedness by complainant to the estate is predicated, substantially, on the following grounds: After the death of the intestate, complainant who was his nephew, and had been living with him, took the possession of, and sold, three hundred and four bales of the cotton then on the plantation of intestate in Russell county; the sale was made to one McAlister, then of Columbus, Georgia, on the following terms, viz.: McAlister was to ship the cotton to the city of New York, and sell it in said city, and pay the complainant fifteen cents per pound therefor, after the sale thereof; and all the proceeds arising from the sale, in excess of the proceeds at fifteen cents per pound, were to be equally divided between complainant and McAlister. Pursuant to this contract the cotton was shipped to New York. On its arrival in that city, it was seized under legal process as the property of the estate of decedent, at the suit of James M. Phillips and William Wright, who had obtained letters of administration on the estate of decedent in the State of New York. McAlister thereupon threatened complainant with a suit for damages, alleged to have been sustained by him in consequence of a breach of the contract between him and complainant for the sale of the cotton. Pending the litigation by the New York administrators for the recovery of the cotton, a compromise was effected by which the litigation was ended, and they obtained the possession of the three hundred and four bales of cotton, as the property of the estate of their intestate; and by which McAlister's claim for damages was satisfied. The compromise was thus effected: Complainant addressed a note to the New York administrators authorizing them to settle with McAlister on account of his claim against complainant for damages, and leaving it discretionary with them to make the best settlement they could; and also authorizing them to charge against complainant in their administration account whatever amount they might have to pay on the settlement. The New York administrators thereupon settled with McAlister by paying him the sum of six thousand dollars, and by paying to the consignee of the cotton the further sum of seven hundred and fifty dollars which had been advanced to complainant on the purchase of the cotton, and by paying complainant's attorney's fees,

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amounting to one hundred dollars, for services in and about the litigation in New York respecting the cotton.

A further liability of complainant to the estate of the intestate is also claimed by the home administrator for the value of ten other bales of cotton, which it is alleged were the property of the estate, and were converted by him to his own use, by an unauthorized sale thereof, after the death of the intestate; the value of which is claimed to have been twelve hundred dollars.

The foregoing items, together with interest thereon, the home administrator contends should be charged against complainant's share of the English fund, and also against his share of the estate generally, as one of the heirs and distributees thereof.

It does not appear whether the New York administration has ever been settled, nor whether there are any outstanding, debts against the estate; but it is admitted in the answer that the estate is solvent, and that it is now being kept together and managed by the surviving administrator for the benefit of the heirs and distributees, under an order of the probate court of Russell county.

The bill was filed against defendant as administrator to recover complainant's share of the "English fund," and was demurred to, and two grounds of demurrer only were assigned, viz.: That the bill contained no equity, and that there was a non-joinder of proper parties defendant.

Upon the hearing of the cause the court overruled the demurrer, and decreed in favor of the complainant for his share of the English fund, with interest thereon. From this decree an appeal is taken to this court.

1. We will first consider the effect of the demurrer to the bill, with the causes thereof assigned.

Section 3330 of the Revised Code declares that "a demurrer to the bill must set forth the ground of demurrer specially, and otherwise must not be heard." To assign as cause of demurrer to a bill simply that "the bill contains no equity," is not a compliance with the requisition of the Code, and raises no question as to defects in the bill curable by amendment. By our Code no objection by demurrer can be taken or allowed, in an action at law, which is not distinctly stated in the demurrer. Rev. Code, § 2656. And it has been held by this court that a demurrer to a complaint, not stating any specific grounds of objection, should, under the influence of the statute, be overruled. *Helvenstein v. Higgason*, 35 Ala. 259; *Pomeroy v. The State*, 40 Ala. 63. The provisions of the Code above cited, in relation to demurrer in equity and at law, are similar in their character, and each should be construed to have the same effect.

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2. But it is contended that the demurrer to the bill in this case on the ground of want of equity is a general demurrer, the effect of which is to turn the inquiry upon the equities of the bill. Such was held by this court to be the effect of such a demurrer before the adoption of the provision of the Code above quoted. *Wellborn v. Tiller*, 10 Ala. 310.

It is true the 30th Rule for the Regulation of Practice in Chancery of force at the time *Wellborn v. Tiller* was decided (Clay's Digest 616, § 30) directed that all demurrers should state the matters of objection. But this was held to be no more than an iteration of the rule which previously governed the practice of all equity courts. *Wellborn v. Tiller*, *supra*. The difference between this rule and the provisions of our Code is, that the one did not prohibit the hearing of a demurrer if it did not state the matters of objection, but turned the inquiry upon the equities of the bill; while the other prohibits the hearing of such a demurrer for any cause not specially named.

3. But if required by the demurrer, in the present case, to pass upon the equities of the bill, we should be constrained to hold that it is not without equity.

The court of chancery has original jurisdiction over the estates of deceased persons; and this jurisdiction has not been impaired or abridged by its having been also conferred upon the court of probate. 1 Brickell's Dig. 647, § 120. It is now the settled doctrine, however, that an *executor* or *administrator* can go into chancery only "when he finds the affairs of his testator or intestate so much involved, that he cannot safely administer the estate, except under the direction of a court of equity;" and that the court ought only to interpose in behalf of an executor or administrator under special circumstances, where injustice to himself, or injury to the estate, may otherwise arise." *McNeill's Adm'r v. McNeill's Creditors*, 36 Ala. 109, and cases there cited. But before the jurisdiction of the court of probate has been called into exercise by proceedings commenced for the final settlement of an administration, equity may be appealed to by a proper party without the assignment of a special reason. *McNeill's Adm'r v. McNeill's Creditors*, *supra*. Thus it was held by this court in *Dement et al. v. The Administrators of Boggess* (13 Ala. 140), that although most, if not all, of the matters involved in that suit might very properly have been litigated and determined by the orphans' court, yet chancery would take jurisdiction of the case, which was for the settlement of an estate as to unadministered assets, a previous settlement having been made by the administrator which purported to be final; and this in virtue of the original power of the court of chancery which re-

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mained unimpaired by statutory inhibition. But in *Scott v. Abercrombie* (14 Ala. 279), COLLIER, C. J., in delivering the opinion of the court, stated that "admitting that it is allowable for chancery courts to exercise a general primary jurisdiction for the purpose of coercing the settlement and distribution of estates, over which the jurisdiction of the orphans' court is unquestionable and ample, it should at least appear that the estate is in a condition to be distributed."

4. The bill we are considering was not filed to compel a settlement and distribution of the estate, but to recover complainant's share of the English fund. When this fund was received by the administrators in Alabama, it became a part of the general assets of the estate in their hands to be administered, and they were properly chargeable with it as such. Their receipt to the foreign debtor for the fund, in the absence of any claim upon it in the foreign jurisdiction, by the creditors of the decedent there residing, or an administrator there appointed, operated as a complete discharge of the debtor from further liability for the debt. The character of the fund, and the source from whence it was derived, did not authorize the complainant to institute a suit to recover his proportion of that fund alone. His bill should have been filed to compel a final settlement and distribution of the estate, to which all the heirs at law and distributees of the estate should have been made parties. The omission to do this was a defect, and if advantage had been taken of it in the court below, it might have been cured by amendment. But no objection having been there made on account of the defect, it cannot be made for the first time in this court. *Jones, Adm'r, v. Beverly*, 45 Ala. 162.

5. In the aspect in which the bill was framed, there was no non-joinder of parties defendant; but the demurrer for this cause did not point out who the absent parties were, and it was for this, if for no other reason, defective. *Chapman v. Hamilton*, 19 Ala. 121.

It follows that the chancery court committed no error in its ruling upon the demurrer to the bill.

6. Other grounds of defence are relied upon against complainant's claim, which it is contended arise in favor of the estate on account of the moneys paid by the New York administrators, at the request of complainant, in compromise and settlement of McAlister's claim for damages against him. And it is also contended that complainant should be charged with the value of ten bales of cotton which belonged to the estate of the intestate, and which, it is averred, were illegally converted by the complainant to his own use, after the death of the intestate.

No cross-bill was filed for the allowance of those claims as
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sets-off, nor for their allowance against complainant on any other equitable ground.

The written request of complainant to the New York administrators to settle the McAlister claim was as follows:—

“James M. Phillips & William H. Wright, *Adm'rs* :

“*Gentlemen*,—Will you please settle for me with Mr. W. J. McAlister, of Columbus, or his authorized agent or assignee, his claim against me for damages, in consequence of my failure to make the title of three hundred and twenty-three (323) B | C sold by me to him. I leave you to make the best terms you can with him, and charge to me in your administration account the amount allowed or paid in settlement.”

(Signed) “*James Wright.*”

It is charged by complainant that this instrument of writing was procured from him by fraudulent representations on the part of the New York administrators, and that it is therefore invalid. Testimony has been taken on both sides in relation to this charge of fraud, which we deem it unnecessary to consider, for the reason that even if the agreement was fairly procured, and is binding upon the complainant, we think it clear that the payments made thereunder by the New York administrators cannot be availed of as a charge against complainant in the present suit.

The agreement, by its terms, authorized the New York administrators to charge against complainant, in *their* administration account, whatever amount might be paid under it. This confers no authority upon the Alabama administrator to charge it against complainant in *his* administration account; and in the absence of a cross-bill making appropriate allegations, sustained by proof of sufficient equitable circumstances to authorize it, the Alabama administrator could not make the charge. It stands, under the naked agreement, as a matter exclusively between complainant and the New York administrators.

7. As to the alleged conversion of the ten bales of cotton, it is sufficient to say, that unliquidated damages arising out of a *tort* cannot be made the subject of a set-off in equity. *Pulliam v. Owens*, 25 Ala. 492. It is true that when money or its equivalent has been received as the proceeds of the tort, the plaintiff may waive the tort and sue in *assumpsit* for the money; but the facts as disclosed by the record were not sufficient to authorize the defendant to make such an election; and if they were, a cross-bill was necessary for the allowance of the amount as a set-off, inasmuch as it was not given or accepted as a payment or discharge *pro tanto* of complainant's distributive share. *Pearson & Wife v. Darrington*, 32 Ala. 274.

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8. It is contended that the complainant should have been required to execute a refunding bond, before the amount of the decree in his favor should be collected. The defendant at the date of the decree had been administrator of the estate for more than seven years; had divided among all the distributees of the estate, except complainant, the amount of the English fund, without requiring or taking any refunding bond from them; made no allegation or claim in his answer that the amount for which complainant sued was necessary to be retained, either in whole or in part, for any legitimate purpose connected with the administration of the estate; did not aver that there were any outstanding debts or demands against the estate, but admitted that the estate was solvent, and of the value of about fifty thousand dollars. Under these circumstances we cannot hold that the chancellor erred in not requiring of complainant a refunding bond.

9. There was no necessity for a reference to the register to ascertain the amount of complainant's share of the English fund. There was no controversy as to the amount; nothing remained to be done but to make a calculation of interest from admitted *data*, and this it was competent for the chancellor to do, without the aid of the register, if, in his discretion, he saw proper to do it.

10. The defendant showed no reason why he should not have been charged with interest. The rule in equity is to allow interest wherever it would have been recoverable at law. *Crocker v. Clements, Adm'r*, 23 Ala. 296. There was no error in charging the defendant with interest.

It results from what we have said that the decree of the chancery court must be affirmed.

NOTE BY REPORTER. — At a subsequent day of the term the appellee moved to have the judgment awarding damages on the *supersedeas* bond corrected so as to allow the amount prescribed by the Revised Code, instead of that prescribed by the ordinance of the Convention of 1867. The motion was overruled in the following opinion: —

BRICKELL, C. J. — A decree was rendered against the appellant in the court of chancery for a specified sum of money, which on a former day of this term was affirmed. The execution of the decree was superseded by the execution of an appeal bond, as prescribed by the statute. R. C. § 3489. We are asked on affirmance, to render judgment for ten per cent. damages, under § 3500 of the Revised Code. By an ordinance of the Convention of 1867, the damages on affirmance were reduced to five per cent. Since the adoption of this ordi-

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nance (Pamph. Acts 1868, p. 182), the practice of the court has been to award only five per cent. damages. Whether the ordinance be valid or invalid, we are unwilling to depart from this practice. If the damages should be increased, it lies with the general assembly to apply the corrective.

The motion is overruled.

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Action for Breach of Contract of Lease.

1. *Computation of time from a given day; rule for.* — Where time is to be computed from or after the day of a given date, that day is to be excluded from the computation, unless it appears that a different computation was intended.

2. *Same.* — Accordingly, there being no other evidence than the written lease "for the term of one year from the first day of November, 1872, to the first day of November, 1873," it was held that the term commenced on the second day of November.

APPEAL from the City Court of Mobile.

Tried before Hon. C. F. MOULTON.

The opinion states the case.

THOS. H. PRICE, for appellant. — Section 14 of the Revised Code regulating the computation of time refers only "to the time within which any act is provided by law to be done." The computation must always conform to the intention of the parties. The meaning of the word "*from*" must always be determined by the context. *Pugh et ux. v. Duke of Leeds*, 2 Cowp. 714. Where the intention is ambiguous on the face of the contract, it may be proved by evidence *aliunde*. The word *from* as explained by the context necessarily includes the first day of November, because the words *for one year* and *to the first day of November, 1873*, must include the first day of November, 1872. Otherwise a year, 365 days, could not be made out. The word "*to*," when used in reference to duration or extent, means *until*.

POSEY & TOMPKINS, *contra*, cited *Lang v. Phillips*, 27 Ala. 313; Taylor's Landlord & Tenant, 78; 1 Washburn Real Property, 385; 2 Wallace, 190; 7 Allen, 487; Revised Code, § 8.

MANNING, J. — In this cause appellant was sued below on his contract to take a house in Mobile as lessee, "for the term of one year from the first day of November, 1872, to the first day of November, 1873, at the yearly rent of three hundred dollars, payable monthly in advance of twenty-five dollars

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each month," and on the alleged breach of such contract, in refusing to take the premises or to pay the rent.

For the defence it was alleged, and there was evidence tending to prove, that on the first day of November, 1872, when defendant went to the premises to take possession, they were still occupied by other persons, who had not yet removed, though endeavoring to remove and give up the premises. It was in evidence that they were vacant and free for the occupancy of defendant on the next day, November 2d.

The court, among other things, charged the jury that "on the face of the contract of lease offered in evidence, plaintiff was not bound to put the defendant in possession of the premises on the first day of November, 1872; that the contract of leasing, or time mentioned in said contract, was one year from the first day of November, 1872, to the first day of November, 1873; that the word 'from,' in law, excluded the first day, when the effect of including it would be to forfeit the lease; that in this case the plaintiff would have performed his contract by placing defendant in possession of the premises on the second day of November. But if defendant could have gone into possession on the first day, it was his duty to have done so; but if he did not and could not have obtained possession on the first day, he could not have lawfully abandoned the contract, for that cause alone, if he could have obtained possession on the second day."

This charge implies that the term of the lease should begin on either the first or second day of November, at the option, or according to the convenience of the landlord, the plaintiff; and that the defendant must take the premises the first day, if then offered to him and unoccupied, but has no right to insist on having them before the next day. Such an interpretation of the contract cannot be correct. There must be fixedness in its terms; it cannot be held to mean one thing to-day and another to-morrow. But this error of the judge below would not be hurtful to appellant and cause a reversal of the judgment, if the term commenced on the second day of November, according to the contract, and not on the first. The question then is, on which of these days did the term begin?

We are not aided in this investigation by evidence of any custom or usage which might explain the sense in which the words of the contract are to be understood. We must be governed by the instrument as it stands alone, and the sense that must be attached to the language of it. In reference to this, in 2 Parsons on Contracts, p. 176, it is said: "Whether in computing time, the day when the contract is made shall be included or excluded has been much disputed. . . . The later cases seem to establish the principle that a computation of this kind

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shall always conform to the intention of the parties, so far as that can be ascertained from the contract aided by admissible evidence. If, however, there is nothing in the language or subject-matter of the contract which clearly indicates the intention of the parties, time should be computed exclusive of the day when the contract was made," or, of course, the day from which the term is to begin.

This seems to have been quite uniformly the received rule of construction, until the interesting decision of Lord MANSFIELD in *Pugh v. Duke of Leeds* (Cowp. p. 714) was made. Of this case, WILDE, J., said in *Bigelow v. Wilson* (1 Pick. 485): "Before the case of *Pugh v. Duke of Leeds*, all the cases agree that the words 'from the day of the date,' are words of exclusion. So plain was this meaning thought to be, leases depending on this rule of construction were uniformly declared void, against the manifest intention of the parties. Of this doctrine thus applied, Lord MANSFIELD very justly complains, not however on the ground that the general meaning of the words had been misunderstood, but because the plain intention of the parties had been disregarded. All that was decided in that case was, that 'from the day of the date' might include the day if such was the clear intention of the parties; and not that such was the usual signification of the words. I think, therefore, we are warranted by the authorities to say, that when time is to be computed from, or after the day of a given date, the day is to be excluded in the computation; and that this rule of construction is never to be rejected unless it appears that a different computation was intended. So also, if we consider the question independent of the authorities, it seems to be impossible to raise a doubt. No moment of time can be said to be after a given day, until that day is expired."

We might add much more to these quotations, for the subject has been prolific of curiously acute discussions, and, like philological topics generally, this has seemed to be an attractive one. But we do not think more words would make the matter clearer. The rule we deduce from the numerous authorities is in harmony with the legislative and judicial ideas which have had expression in this State, and it is this: "When time is to be computed from, or after the day of a given date, the day is to be excluded from the computation, . . . unless it appears that a different computation was intended." Section 14 Rev. Code.

The question still recurs, however, does it appear that a different computation was in this case intended?

According to the lease, defendant was to have the premises for "the term of one year *from* the first day of November, 1872, *to* the first day of November, 1873." There is there-
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fore a terminus *ad quem*, as well as a terminus *a quo*; and the space of time to be measured by them must be one year. Does this clear the case of difficulty?

For appellant it is insisted that the word "to," before "the first day of November, 1873," makes the term of the lease reach only the beginning of that day? But why shall it be held to mean *up to*, any more than *into*? Does not the clause mean that the period referred to shall not extend *beyond* the day mentioned, quite as much as it means continuance until the beginning of it? If the term commenced with the beginning of the second day of November, 1872, which, according to the rule above stated, would be "*from* the first day" of that month, the prescribed year would run out or close with "the first day of November, 1873," — and so would not extend beyond the day which is made the terminus *ad quem*. There is, therefore, nothing in the lease which makes it necessary that the rule we have referred to should be rejected; and that rule requires that we should hold that the term commenced on the second day of November, 1872.

It seems, no doubt, probable to most minds, that when the first day of a month is mentioned, as in this case, in connection with a day which is to be the starting point of a term of years, that the two are intended to be coincident. But is not this a mere idea of the fancy, arising out of a seeming fitness that when the two periods of time are to run a large part of the way in conjunction, one with the other, that the first days of each should be the same? The same notion would not arise in the mind, if the instrument to be construed provided that the term it created should begin *from* the 11th day of the month. And it will not do to let an important rule of law be superseded or set aside by a mere suggestion of the imagination.

Knowledge that the lease was made in Mobile, — and that the premises were situated there, — and that by a general custom or usage in that city (if there be any such), leases there commence on the first day of November, might perhaps compel the mind to the conclusion that this lease was intended to begin on that day. But looking to the language of the instrument alone, the rule of construction applicable to it requires us to hold that the term created by it began with, or upon the second day of November.

There is no error which justifies us in reversing the judgment below, and it is therefore affirmed.

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Bill in Equity to enforce Vendor's Lien.

1. *Equitable separate estate; what creates.*—A conveyance of real and personal property to a married woman "absolutely and in her own right" to have and to hold "to her, her heirs and assigns, for her own separate and absolute use and behoof forever, in fee simple," creates an equitable separate estate. (Overruling on this point *Molton v. Martin*, 43 Ala. 651; *Glenn v. Glenn*, 47 Ala. 204; *Denechaud v. Berry*, 48 Ala. 591.)

2. *Same; rights of wife as to.*—The wife must be regarded in equity as a *feme sole* with respect to her equitable separate estate, having capacity to bind or charge it by her contracts, and to alienate or otherwise dispose of it. She may mortgage it as security for her own debt, or that of another.

3. *Equitable separate estate; what construction determines.*—Where by the gift or devise the intent to exclude the marital rights of the husband clearly and unequivocally appears from the force and certainty of the terms employed, an equitable separate estate is created.

4. *Statutory separate estate; what construction determines.*—Where the intent to exclude the marital rights of the husband is doubtful or equivocal, or rests on speculation, the statute intervenes and fixes the character of the estate as the separate statutory estate of the wife.

5. *Mortgagee; when treated as bonâ fide purchaser.*—Where a mortgage is made as security for a debt, contracted coterminously with it, the mortgagee becomes a *bonâ fide* purchaser, entitled to protection against an outstanding vendor's lien of which he had no notice.

APPEAL from Chancery Court of Macon.

Heard before Hon. B. B. McCRAW.

The material facts of this case as gathered from the bill, and an agreed state of facts which it was consented might take the place of answer, are as follows:—

The appellee, A. J. Battle, being seized in fee of the house and lot in controversy, agreed with Cullen A. Battle and John Gill Shorter that the three should make an equal contribution and give the house and lot, together with a small amount of personal property, to Mrs. Jane Battle, who was the mother of the two former, and mother-in-law of Shorter. In pursuance of this agreement the appellee, on the 27th day of July, 1867, sold and conveyed a two thirds interest in the premises to Cullen A. Battle and John Gill Shorter, they each executing to appellee their promissory notes for the purchase-money. On the same day the three, in consideration of five dollars, and the further consideration "of natural love and affection, and for the purpose of securing to her a comfortable residence and home for herself, and family, and friends, absolutely and in her own right" conveyed the premises to Mrs. Jane Battle, "to have and to hold to her, her heirs and assigns, for her own separate and absolute use and behoof forever in fee simple." In November, 1868, Mrs. Jane Battle, her husband, and Cullen A. Battle executed a mortgage on the premises to Robert H. Short, to secure a debt contracted coterminously with it by Cullen

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A. Battle. Short had no notice that the purchase-money was due or unpaid on the land at the time he took the mortgage. In December, 1869, Cullen A. Battle and Shorter having become unable to pay their notes to A. J. Battle, Mrs. Jane Battle and her husband reconveyed to him by quitclaim deed, "in consideration of his equities, and the surrender and cancellation of the notes to Cullen Battle and Shorter. In 1871, Short was proceeding to sell the land for the payment of the mortgage debt in pursuance of the power of sale given therein," when the appellee, A. J. Battle, filed his bill, alleging that although the notes were given up, the purchase-money has never been paid; that Short was charged with constructive notice that Mrs. Battle had not power to sell the property or mortgage it for the payment of the debt of another, and that the mortgage to him is a cloud on the title, &c. A perpetual injunction is prayed against a sale under the mortgage; and also that the notes be reestablished, and the amount due for the purchase-money be declared a lien upon the land, and the same sold for its payment, or that the sale and reconveyance from Mrs. Jane Battle be confirmed, as may be equitable under the facts.

The court overruled a demurrer interposed by Short, the only defendant who contested the relief sought, and decreed a sale of the lands for the purchase-money, holding void the mortgage conveyance to Short, who appeals, and assigns the decree for error.

GRAHAM & ABERCROMBIE, for appellant.

STONE & CLOPTON, *contra*.

BRICKELL, C. J. — On the 25th July, 1867, a conveyance of real and personal estate was made to Jane A Battle, a married woman, by her two sons and her son-in-law, in consideration of love and affection, to secure to her a comfortable residence, "absolutely and in her own right." The *habendum* of the conveyance is as follows: "To have and to hold unto her, the said Jane A. Battle, her heirs and assigns, the said house and lot, and the said household furniture and lot property, horses and carriage, for her own separate and absolute use and behoof forever, in fee simple." A question decisive of this case is, whether the estate created by this conveyance is to be deemed and taken as a statutory, or as an equitable separate estate? If the former, the appellant, by the mortgage under which he claims, acquired no right or interest in the premises. If the latter, the mortgage is a valid security for a debt created contemporaneously with its execution; and the appellant is entitled to protection against outstanding equities of which he had no notice.

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The common law though regarding marriage as a civil contract distinguished it from other civil contracts, by treating it as the formation and foundation of a connection the parties by their own consent were incapable of dissolving. This connection involving the duty of living together, in the nature of things, "the power of umpire must be placed in the hands of the one or other of them." 1 Bish. Married Women, § 888. This power was committed to the husband: the husband and wife were regarded as one person, and her legal existence and authority in a degree lost or suspended, or as it was sometimes expressed, merged in that of the husband. She had not capacity to contract, nor had she administration of property. By the marriage, if the wife was seized of an estate of inheritance, the husband became seized thereof, taking the rents and profits during their joint lives, and by possibility during his life. If the wife had an estate of freehold, not of inheritance, as for her own life, or the life of another person, the husband became seized of such estate, and entitled to the rents and profits during marriage. If the estate was *per autre vie*, the husband surviving the wife became a special occupant of the land during the life of such person. Her chattels real passed to the husband, who had power to sell, assign, or make other disposition of them at pleasure. As to her choses in action, he had an unqualified right of reducing them to possession, and thereby acquiring absolute ownership of them. He could sue for and recover, release, discharge, or assign them. If without receiving them, or changing or altering their character, he died, his right of reducing to possession, springing out of and dependent on the marital relation, terminated with its dissolution. Of her personal property in possession, *eo instanti*, the marriage, title and possession passed to the husband. So of personal property, title and possession of which accrued to the wife during marriage, the possession of the wife was the possession of the husband; "because her legal existence is merged in his, and the wife is positively incapable of a possession, in the eye of the law, distinct from that of the husband." *Bell v. Bell*, 37 Ala. 541.

Although the husband acquired rights, he was subjected to duties and responsibilities; and though the legal existence of the wife was lost in that of the husband, compensation was afforded her, in relieving her from duty and responsibility. The wife not being *sui juris* was not subject to suit, and her husband became liable for her debts contracted prior to marriage, if they were enforced during coverture. He was answerable for them, not because he had received her fortune, for he may have received nothing, but because after marriage the wife was not *sui juris*, — had not a legal existence. The husband was

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bound to maintain her, — to supply her with necessaries suitable to her wants, and to his condition in life. If he failed, she could obtain them on his credit, and he was bound to pay for them. There was no event in which the husband, by his own act or contract, could fix a debt or liability on his wife, whatever may have been her dereliction of duty. For his torts or frauds she could never be made liable, though committed in her presence, and under the pressure of coercion from her. For her torts and frauds the husband was answerable, and if committed in his presence, and by his command, he alone was liable. The child could not be relieved from liability for torts or frauds, because the father was present commanding or inciting to their commission. The wife could enter into no contract, however meritorious its consideration, which had legal obligation. If she survived her husband, and did not ratify or confirm, it was void. The husband was bound to protect her, and if protection demanded a resort to legal remedies, and he failed to assert them, lapse of time would not bar her, and statutes of limitation were generally so framed, that during coverture she was exempt from their operation. The protection of the wife — the preservation of the harmony of the marital relation — was the principle on which the common law proceeded. It had its origin in the habits, thoughts, and opinions of the people subject to it. As these changed, gradual changes of the law were wrought, accommodating the one to the other.

Resting on this principle, it was the policy of the common law to favor the marital rights of the husband. The courts of common law looked steadily to, and took cognizance of legal titles only. The separation of the use and enjoyment, and of the beneficial ownership of property, as distinct from the legal title, had its origin in the doctrine of trusts, which were the subject of the exclusive jurisdiction of a court of equity. From this doctrine springs the separate estates of married women, often denominated common law separate estates, rather because they had been so long known and recognized at common law, as existing in courts of equity, than because they rest on any common law principle. The simplest form of a trust would be the conveyance of an estate to A. for the use and benefit of B. In a court proceeding on common law principles only, A. would hold the legal title, and could take the rents and profits without liability to B. In a court of equity he would hold the legal title as a trust only, that it should not be asserted to the injury of B., and to him he would be compelled to account for the rents and profits. A trustee not being interposed, a gift, devise, or conveyance to a married woman for her sole and separate use, free from the control of her husband, created a trust, and this trust was her separate estate. Incapable of acquiring or

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holding property at common law, and the title to all property enuring to her during coverture, vesting in her husband, the legal title vested in him, but as a trustee only. The trust for the sole and separate use of the wife was as chargeable on his conscience as if the conveyance, gift, or devise had been to him for the use and benefit of a stranger. To the creation of this trust — of this equitable separate estate of a married woman — no particular language, no technical form of expression, was necessary. It was enough that there was manifest an unequivocal intent to exclude the rights of the husband — to vest in the wife the exclusive use and enjoyment. This intention being apparent, it was supported and carried into execution. A conveyance in the form of the one now under consideration, for the separate and absolute use of the wife, it was never doubted, would exclude the marital rights of the husband, and create in the wife an equitable separate estate.

Departing from the common law principle, of the incapacity of the wife to take and hold property, it was, according to the authorities which have prevailed in this court, a logical and legal sequence, that as to such property the wife should be regarded as a *feme sole*, having capacity to contract, alienate, or otherwise dispose of, or to charge it, unless restrained by the instrument creating the estate. *Forrest v. Robinson*, 4 Port. 44; *Bradford v. Greenway*, 17 Ala. 797; *McCroan v. Pope*, Ib. 612; *Collins v. Rudolph*, 19 Ala. 616; *Booker v. Booker*, 32 Ala. 478; *Paulk v. Wolfe*, 34 Ala. 541; *Gunter v. Williams*, 40 Ala. 561.

Applying this principle to the present case, if it is determinable according to the principles by which it would be determined in the absence of statutory provisions, the result would be that the grantee, Mrs. Battle, has a separate estate in the premises. This estate she was capable of alienating as if she were a *feme sole*, and of consequence, charging it by mortgage, as a security for her own debt, or that of another. The mortgage being made as security for a debt contracted contemporaneously, the mortgagee becomes a *bond fide* purchaser, entitled to protection against the equities of the appellee, of which he had not notice. The mortgage security enters into the consideration on which the credit is given. *Wells v. Morrow*, 38 Ala. 125.

We now reach the difficult question presented. Is this estate subject to the statutes defining the separate estates of married women, — their mode of enjoyment, the rights and powers of the husband and of the wife over them, the extent to which they are alienable, or liable to be charged, and the course of their descent and distribution? This question was answered by a series of decisions in this court, in which it was

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the subject of patient, careful, and thorough consideration, announcing that these statutes "relate to and provide for estates of married women which are made separate by operation of law; estates are created by descent, gift, or in some other manner, *without words which would have created a separate estate before our statutes on the subject; and not to estates which, independent of legislation, would have been separate by operation of the instrument or contract creating them.*" *Pickens v. Oliver*, 29 Ala. 528; *Cannon v. Turner*, 32 Ala. 483; *Cowles v. Morgan*, 34 Ala. 535; *Huckabee v. Andrews*, Ib. 646; *Smith v. Smith*, 30 Ala. 642. The argument of the question was exhausted in these decisions. They were accepted by the profession, and acted upon by the community, as a conclusive and definitive exposition of the law. In reliance upon them contracts were made, credit was extended, and estates alienated, or subjected to charges by way of mortgages or other security for debts. Though these decisions have not been expressly overruled, there have been since several decisions announcing a different and antagonistic rule. They commence with the case of *Molton v. Martin* (43 Ala. 461), in which it is held that a conveyance to the wife in terms which would have created a separate estate at common law creates a statutory estate.

The former decisions are not referred to, and the theory of the opinion, is thus stated: "The deed conveys the property of Mrs. Molton, to her sole and separate use and behoof. Before the Code, the terms of this conveyance would have excluded the marital rights of the husband, and given the wife such an interest in the property as she could have charged by her simple promissory note. But § 2371 Revised Code makes all property of the wife, held by her previous to the marriage, in any manner, the separate estate of the wife, not subject to the payment of the debts of the husband. Is there such an opposition in the terms of the deed and those of the statute that both cannot stand together? What is the difference between the separate estate of the wife, not subject to the payment of the debts of the husband, and an estate of the wife to her sole and separate use and behoof? Is there such an evident intention expressed in this deed to change the tenure of the estate, as to overcome the denial of the answer," &c. We have quoted all that is said on this point in that case.

The statute, so far as this opinion refers to it, simply declares: "All property of the wife, held by her previous to the marriage, or which she may become entitled to after the marriage, in any manner, is the separate estate of the wife, and is not subject to the payment of the debts of the husband." If it is conceded a conveyance, expressed in the words of the

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statute, — declaring the property conveyed the separate estate of the wife, not subject to the payment of the husband's debts, — would under the law existing prior to the statute have created in the wife an equitable separate estate, the question would remain, what are the qualities and incidents of this estate — what its tenure, and the power of the donee over it? If the statute had merely contained the declaration we have quoted; if it had not gone further, and defined the nature, quality, and incident of the estate declared separate; if it had not prescribed the power of the wife over it, and clothed the husband with an interest in it, inconsistent with the nature and quality of an equitable separate estate, — the estate it creates would have been controlled by the law controlling and defining the equitable separate estate, — it would have been that estate and no other. A statute converting an estate tail — an estate to A. and the heirs of his body — into an estate in fee-simple, leaves the nature and quality of an estate in fee-simple to be ascertained from the common law. A statute declaring only that the property of the wife shall be her separate estate, leaves the nature and quality of the estate to be regulated and controlled by the prevailing law operating on such estates. All statutes are construed and read in the light of, and in connection with, the common law, and of the fact that its principles remain of force, unless directly repugnant to the statutory provision.

The first statute creating separate estates in married women, approved March 1, 1848 (Pamph. Acts 1847-8, p. 79), was, as to the tenure of the estate, more specific in its language, though not variant in legal effect, from the present statute. It not only declared the property of the wife, whether owned by her at the time of the marriage, or subsequently acquired, should be her separate estate, but further that it should be taken, held, and esteemed in law "for her sole and separate use, notwithstanding her coverture; and no husband shall by his marriage acquire a right to the property which his wife had upon his marriage, or which she may after acquire by descent, gift, devise, or otherwise, except as hereinafter provided for." The power of the wife over this separate estate was not defined; of her capacity to charge it, the statute was silent. In *Hooper v. Smith* (23 Ala. 639), it was held, that the wife could charge, sell, or dispose of the estate the statute of 1848 created, without the consent or concurrence of her husband; that as to her capacity of disposition, in nature, quality, and incident, it was an equitable separate estate. If the present statute was in terms similar to that of the statute of 1848; if it did not define the extent of the wife's capacity to dispose of her separate estate, though the terms in which

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the estate is created are not in opposition to, but precisely the terms in which an equitable separate estate could be created, her power of disposition over the one would be the same she has over the other. The inquiry is not, of consequence, whether the terms of a conveyance and of the statute are in opposition, but whether, when the terms of a conveyance create an estate, the nature, quality, and incidents of which are well defined by law, the statute intervenes, and not only destroys these, but attaches a nature, quality, and incident wholly variant? Or, is not the statute confined in its operations to estates, the nature, quality, and incident of which is not defined in the conveyances creating them? It cannot be supposed the statute is designed to affect the capacity of a donor to devolve on a woman, married or sole, any estate not prohibited by law — or to diminish the capacity of the woman to take. The donor may create, and the donee may take since the statute, any estate which could be created or taken prior to its enactment. The statute affects and impairs only the marital rights of the husband. When an equitable separate estate is created by a gift, conveyance, or devise, an estate is created differing in nature and quality from the estate of the wife under the statute. Differing in nature and quality, though there may be no opposition between the words of the statute and the terms in which the other is created, the two cannot stand together. Of the wife's equitable separate estate the husband cannot take the rents, income, and profits, against her consent. It is not chargeable with his debts, even when contracted for necessities for the household. It cannot be made liable for the wife's own maintenance, except by her own contract. On her death, it passes to her heirs or next of kin, subject only to the husband's tenancy by curtesy of the real estate. Its value is not computed in ascertaining the wife's dower and distributive share of the husband's estate, if she survive him. She has capacity to charge it, or to alienate it, larger than she can exercise over the estate the statute creates. The two estates have no features in common, except that each exclude the marital rights the common law conferred on the husband, and of consequence are freed from liability for his debts, and from the want of purity and precision of legal expression, they have been indifferently called separate estates. In respect to liability for the husband's debts, the equitable separate estate is freed entirely, and the statutory estate is subjected to a limited liability, for debts contracted for articles of comfort and support of the household. This liability cannot be fixed on the equitable separate estate, an indispensable element of which is freedom from all liability for the husband's debts, though contracted for the wife's exclusive benefit, and she was the sole recipient of the

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consideration. *M. E. Church v. Jacques*, 3 Johns. Ch. 77; *Gunn v. Samuels*, 33 Ala. 201. The inquiry therefore is not whether there is any inconsistency between the terms employed in the statute declaring of what the wife's separate estate consists, and the terms of a conveyance creating an equitable separate estate, but whether, when an equitable separate estate is created by conveyance, the statute can intervene, and convert the estate thus created into an estate wholly different in its nature and quality? If it can, it must be because it abolishes the estates the conveyance creates, and substitutes another for it, as does the statute abolishing estates tail, or, speaking more properly, converting them into fees-simple. Such has never been supposed to be the operation of the statute.

The decision in *Molton v. Martin*, *supra*, was succeeded by the case of *Glenn v. Glenn* (47 Ala. 204), in which a devise to a wife, "*for her sole and separate use during her natural life, and at her death to be equally divided between the children she may leave, or their lawful heirs*," was construed as creating a statutory estate. The court allude to the former decisions distinguishing the statutory estate from the equitable separate estate, but declare an inability to see the basis on which the distinction rests. It was held the statutes repealed all laws regulating equitable separate estates, superseded them, and substituted the statutory estate in all cases, except where a trustee was interposed. The case of *Denechaud v. Berry* (48 Ala 591) asserts the same doctrine on the same reasoning. We are not informed why the mere interposition of a trustee excepts the estate from the operation of the statute. If the exception exists, it is not because the statute expressly declares it, but it arises from construction, and is dependent on the reasoning pursued in *Sprague v. Tyson* (44 Ala. 338), that the interposition of a trustee, intercepting the husband's rights to take the rents and profits, is inconsistent with the nature of the statutory estates.

The error in the reasoning of the learned judge pronouncing these decisions rests on the hypothesis, that the statutes declaratory of what the wife's separate estate consists, or more properly speaking taking away the husband's marital rights, as they existed at common law, and would now exist but for the statutes, affect or change the law by which equitable separate estates were created and regulated. The statute really does not create, and was not intended to create, an estate in the wife. Before the statute can operate, the estate exists in the wife, and to that estate the common law attaches the marital rights of the husband. The divestiture of these rights was the purpose of the statute. It was the exercise of these rights, and the consequences resulting therefrom, which pro-

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duced the mischief the statute proposed to remedy. The husband was not compelled to assert these rights; until he asserted them, the property remained the property of the wife. He could renounce all claim to the wife's personal property, and elect to treat it as hers, and hold or control it as her trustee. The property then remained the absolute estate of the wife, as if she did not rest under the disabilities of coverture and the estate had never been subject to the marital rights of the husband. *Machen v. Machen*, 38 Ala. 364; *Jennings v. Blocker*, 25 Ala. 415; *Gillespie v. Burleson*, 28 Ala. 531; *Gwynn v. Hamilton*, 29 Ala. 233. In the absence of the statute, if the husband did not renounce his marital rights, the property of the wife became the property of the husband. He had unqualified dominion over her personal property; and of her real estate, but a mere reversion was left in the wife or her heirs. Having title, it was subject to the payment of his debts, and he could alienate or devise it at pleasure. To take away these common law rights of the husband, and to define and regulate the manner in which the property of the wife should be held, to which these rights would have attached, was the only purpose of the statutes. Property of the wife to which these rights could not attach; which was, by the instrument conferring title, freed from them, and from all liability to the husband's debts, and from his power of disposition, was not within the purview of the statutes. Such property was not subject to the mischief the legislature proposed to remedy. It was secured to the wife without the aid of the statutes. It was left to be governed by the law, which for ages protected it, while the statutes find a field of operation in securing to the wife other property needing legislative protection.

As we have said, these decisions concede that, if a trustee is interposed, the statutory estate is not created, — the interposition of a trustee depriving the husband of the right as trustee to take the rents and profits. If the legal title is vested in a trustee, and the equitable title in the wife, what frees this equitable title from the operation of the statute, if the theory of these opinions be correct? When the rents and profits pass from the trustee, who shall receive them? If paid to the wife, what absolves them from the right of the husband to take them without liability to account? The mere statutory right of the husband to take the rents and profits, without liability to account, is one of the most insignificant elements of the wife's statutory estate. It is an incident which would probably have attached to the estate, in the absence of express statutory provision. Of her equitable separate estate, the husband, while living with the wife, could receive the income

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and profits, and in the absence of express dissent on her part, it was presumed they were received with her consent, and they were regarded as a gift to him. *Roper v. Roper*, 29 Ala. 247; *Andrews v. Huckabee*, 30 Ala. 143. The important and distinguishing characteristics of the statutory estate are its liability for necessities suitable to the degree and condition in life of the family, and the mode of enforcing this liability; the right of the husband, a right akin to that of an heir, or of a next of kin, to take one half of the wife's personalty absolutely, if she dies intestate, and he survives her, and the use for life of her lands; the subtraction of the value of the statutory estate from the value of the wife's dower, and distributive share of the husband's estate, if she survives him; the positive disability of the wife to alien or charge the estate except as the statute authorizes. These are the peculiar characteristics of the statutory estate, distinguishing it from the equitable separate estate of the wife, — characteristics not belonging to the latter estate, and which could arise only from express limitation, or stipulation in the instrument creating it, and some of them incapable of creation even in that mode. Under the statute, the property of the wife may be held by an equitable or legal title. Whether held by the one title or the other, it is her statutory estate if not otherwise limited.

The donor of the estate, if he offends no law, may impose whatever limitations, or impart whatever qualities or incidents he chooses to the estate he may create. When by proper words he creates an equitable separate estate, does he not as clearly manifest an intention to deprive the husband of the statutory right to take the rents and profits, as if he had made the gift in form to a trustee? When an equitable separate estate is created by gift, devise, or conveyance, or any other trust is created, the nomination and appointment of a trustee is not material. The trust is the subject of equity jurisdiction, and can never fail for the want of a trustee. The interposition of a trustee, in whom the legal title was vested, would not prevent the marital rights of the husband from attaching to the interest created in the wife at the common law. 2 Brick. Dig. 82, § 169. The only effect ascribed to it in these decisions is, that it intercepts the right of the husband to take the rents and profits; affecting his right in this respect only, what is it that cuts off the statutory right to the use and occupancy of the wife's real estate during life, if he survives the wife, whether there be issue born of the marriage or not? What is it that divests his right to take absolutely, as if he were next of kin, one half of her personalty? It is not the interposition of a trustee, but the force and effect of the terms

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of conveyance, creating in the wife an estate separate from all right or interest of his, — an estate which cannot be more accurately described than as an estate to her sole and separate use, — an estate she takes and enjoys as if she were a *feme sole*, which effect these results.

Without extending this opinion, by a repetition of the reasoning pursued in the earlier decisions, which seems to us unanswerable, we feel constrained to overrule the cases of *Molton v. Martin*, *supra*, *Glenn v. Glenn*, *supra*, and *Denechaud v. Berry*, *supra*, on the point we have considered. The former decisions were made soon after the enactment of the statutes creating a married woman's statutory estate. They announce that these statutes apply only to such estates of the wife as would not without statute have been a separate estate, and not to estates which by the terms of their creation are esteemed the separate estate of the wife. On this principle the mischief the statute proposes to correct is fully met, and the conveyances of parties allowed full operation. When by a gift or devise the intent to exclude the marital rights of the husband clearly and unequivocally appears from the creation in express terms of an equitable separate estate, — when it is not to be inferred from doubtful or equivocal expressions, — when the exclusion of the husband rests not on probability or possibility, but on the certainty and force of the terms employed, the statutes do not apply. But if the intent is doubtful or equivocal, — if it is matter of speculation, — the statute intervenes, as the common law would in its absence have intervened, and defines the character and quality of the estate.

The decree of the chancellor was not in accordance with these views, and must be reversed, and a decree here rendered dismissing the appellee's bill at his costs in this court, and the court below.

Whitfield v. Riddle, Administrator.

Action on Promissory Note by Payee against Maker.

1. *Confederate currency; sufficient consideration to support promissory note.* — A promissory note, executed by and payable to a party residing at the time within the Confederate lines, for a loan of Confederate currency is supported by a valid consideration. (*Hale v. Huston, Sims & Co.* 44 Ala. 134, overruled.)

2. *"Dollars," meaning of.* — The word "dollars" in such a note does not necessarily mean dollars of the United States, but the contract must be read in light of surrounding circumstances to determine in what currency it was solvable.

3. *Same; measure of recovery.* — In an action since the war on a note payable during the war, given in consideration of the loan of Confederate currency, and intended to be discharged in "dollars" of that currency, the measure of recovery is the value of the currency at the time of the loan.

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APPEAL from the Circuit Court of Marengo.

Tried before Hon. L. R. SMITH.

This was an action on a promissory note executed by defendant's intestate, and others not sued, on the 3d day of April, 1863, and payable to plaintiff twelve months after date, for seven thousand five hundred and sixty dollars, "money loaned." The evidence showed that the note was given for Confederate currency, loaned, and that the payee and makers of the note were at the time resident citizens of Marengo county, Alabama.

The court charged the jury that if they believed, from the evidence, that the note was given for the loan of Confederate currency, they must find for the defendant; to which charge plaintiff excepted.

F. S. LYON, with whom was THOS. H. WATTS, for appellant.

BROOKS & LYON, *contra*.

MANNING, J.—The question presented in this cause is, whether a loan made in 1863, in Confederate treasury notes, is a sufficient consideration to sustain as valid a promissory note executed for it to the lender,—in a transaction between persons residing at the time in this State. The court below answered the question in the negative. The supreme court of this State, in *Scheible v. Bacho* (41 Ala. 423), adjudged a note given for such a consideration to be valid,—WALKER, C. J., delivering the opinion of the court. This was in January, 1868.

Afterwards, in 1870, our immediate predecessors on this bench made a contrary decision, PECK, C. J., dissenting, in *Hale v. Huston, Sims & Co.* 44 Ala. 134.

In each of these cases one out of the three members of the court differed from the other two. And under the circumstances, we feel it to be our duty to follow that decision which we consider best sustained by argument and authority.

The point was presented for decision in Kentucky early in 1866. In a portion of that State which was, at the time, within the lines and under the dominion of the Confederate authorities, an owner of land sold it, and received the price in Confederate treasury notes,—he executing a bond to make titles afterwards. Having refused to comply with the obligation of his bond, he was sued; and the court unanimously held it to be valid. A similar decision has been made in the supreme court of Tennessee in *Naff v. Crawford* (1 Heiskell), overruling a contrary decision that had been previously made.

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In June, 1867, the case of *Phillips v. Hooker* was decided in the supreme court of North Carolina. The defendant was sued in equity for a specific performance of his agreement to convey lands, and insisted that he was not bound to do so, because the only payment made for them was made during the war, in Confederate treasury notes, a currency illegally issued for an unlawful purpose. The judges unanimously agreed that the defence set up was not a valid one. A passage from the opinion of Chief Justice PEARSON in that case, full of cogent reasoning, is incorporated in that of WALKER, C. J., in *Scheible v. Bacho*, *supra*. "It may be conceded" (says PEARSON, C. J.), "that if at the outbreak of an insurrection parties to contracts, *with a view to aiding the cause*, by giving credit and circulation to its paper, receive it as money in their dealing, such contracts are illegal. But that is not the case under consideration. In 1862 the contest had assumed the magnitude and proportions of war; each party in territorial limits had the boundaries of a mighty nation; and each party counted its people by millions. . . . The government of the United States was unable to protect the people; and there was no currency but Confederate treasury notes. . . . Was the merchant to close his store, the blacksmith and shoemaker to quit work, and the farmer to let his tobacco and surplus grain rot on his hands, and allow his family to suffer for clothing and the other necessities of life, or do an illegal act by receiving Confederate notes? Really, unless the receiving of such notes can be connected with a criminal intent to aid the rebellion, the question seems to me too plain to admit of argument. A naked statement exposes the absurdity of the proposition."

Taking up the same line of argument in *Scheible v. Bacho*, Chief Justice WALKER says: "The issue of the Confederate States currency had the effect of contributing means to prosecute the war. The passage of that currency in the making of contracts may have contributed indirectly to the preservation of its value. This indirect, remote effect does not vitiate the contracts based on such currency." He then proceeds, by ample citations from authorities of the highest order, to establish this and some kindred propositions; and in conclusion of the argument he exclaims: "Surely . . . a humane government would prefer a submission to the use of the currency prescribed by the government actually dominant, to the dreadful consequences which would result from the opposite course. . . . Humanity and civilization would be shocked by the fixing of a stigma upon obedience to a necessity which bound and fettered the will by an inexorable power. Obedience to this necessity was rendered cheerfully or reluctantly, according as the cause of the Confederate government was or was not favored; but in every case such obedience was unavoidable."

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And in December in the same year (1868) Chief Justice CHASE delivered the unanimous opinion of the supreme court of the United States, in *Thorington v. Smith* (8 Wall. 1), an opinion imbued with the humane and enlarged ideas of the publicists, and confirming the expectations intimated as above, by Chief Justice WALKER.

After adverting to the rules of public law applicable to a people whose regular government has been expelled by another of paramount force, whether that other be a foreign government or one set up by insurrection, Chief Justice CHASE says of the Confederate government: "It was by this government exercising its power throughout an immense territory that the Confederate notes were issued early in the war; and these notes, in a short time, became almost exclusively the currency of the insurgent States. . . . While the war lasted, they had a certain contingent value, and were used as money in nearly all the business transactions of many millions of people. . . . It seems to follow, as a necessary consequence from this actual supremacy of the insurgent government as a belligerent, within the territory where it circulated, and from the necessity of civil obedience on the part of all who remained within it, that this currency must be considered in courts of law in the same light as if it had been issued by a foreign government, temporarily occupying a part of the territory of the United States. Contracts stipulating for payments in this currency cannot be regarded, for that reason only, as made in aid of the foreign invasion in one case, or of the domestic insurrection in the other. They are transactions in the ordinary course of civil society; and though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except when proved to have been entered into with actual intent to further invasion or insurrection. We cannot doubt that such contracts ought to be enforced in the courts of the United States, after the restoration of peace, to the extent of their just value."

It was, accordingly, decided that the maker of a note payable in that currency, who was sued upon it in a federal court after the war was over, must pay the value of the amount of that currency specified in the note to his creditor.

PECK, C. J., in dissenting from the majority in *Hale v. Huston, Sims & Co.*, referred to *Thorington v. Smith* as an authority adverse to the conclusion attained by his colleagues. One of them, moreover, in delivering the opinion of the entire court, in *Roach v. Gunter* (44 Ala. 209), about the same time, and at the same term of the court, said: "The right of the citizens of Alabama to contract with each other was as complete during the war as it was before, or is now. They were at that

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time constrained by necessity to use the Confederate currency as a medium of exchange." Of course, therefore, that currency had a "purchasing capacity." In the language of Chief Justice CHASE (*supra*), it was "used as money in nearly all the business transactions of many millions of people." If, then, some of those millions of people, wishing to obtain that currency for the payment of debts, or purchase of property, should borrow it of others, why should they not be required to perform the contracts upon which it was obtained? If the courts of the United States, the party offended by the great insurrection, would enforce such obligations entered into by persons in Alabama during the war, the courts of Alabama ought, it seems to us, to follow their decisions.

Perhaps the majority of the court that decided the case referred to supposed there was a difference in principle between a promissory note payable in Confederate currency, and one given for the loan of such currency. That this was not the opinion of the supreme court of the United States is made manifest by subsequent decisions.

In *Delmas v. Insurance Company* (14 Wall. 661), decided on the authority (upon this point) of *Thorington v. Smith*, the supreme court of the United States held that a note and mortgage to secure it, the consideration of which was Confederate money, not only constituted a valid contract, but that the courts of the United States would protect and enforce the obligation thereof against a clause in the Constitution of Louisiana which declared that "All agreements, the consideration of which was Confederate money, notes, or bonds, are null and void; and shall not be enforced by the courts of this State." A similar ruling was made by the same court in *Planters' Bank v. Union Bank*, 16 Wall. R. 483. And in a subsequent case the same tribunal, referring to the case of *Thorington v. Smith*, said: "It would have been a cruel and oppressive judgment if all the transactions of many millions of people composing the inhabitants of the insurrectionary states, for the several years of the war, had been held tainted with illegality, because of the use of this forced currency, when those transactions were not made with reference to the insurrectionary government."

This court said, in *Riddle v. Hill* (decided at June term, 1874): "On this and kindred distressing questions, the inevitable result of the war and which are of especial interest to the people of ten States, and on which uniformity of decision is of vital importance, this court has often announced its purpose to follow the adjudications of the supreme court of the United States when made. The settlement of these questions, so far as dependent on judicial decisions, probably lies within the province of that tribunal. If it does not, to avoid diversity of de-

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cisions on these questions, and a conflict of authority, there is, it seems to us, an eminent propriety in state tribunals yielding to its adjudications."

Moved by these considerations, we feel constrained to overrule the case of *Hale v. Huston, Sims & Co.*, *supra*. We hold, that contracts and transactions entered into and had between persons residing in Alabama, during the late civil war,—of which the notes known as Confederate currency constituted the consideration,—are, if not otherwise exceptionable, valid and binding, and should be upheld and enforced in the courts of this State.

When a contract of this sort appears to be for the payment of money which is described as "dollars," the cases we have referred to — *Riddle v. Hill*, *Thorington v. Smith*, *Confederate note case*, *supra*, and others—decide that the word "dollars" is not to be taken necessarily as dollars of the United States; but that the circumstances attending the transaction and belonging to it are to be looked to in order to determine whether it was not understood and intended that the debt should be discharged in dollars of Confederate currency.

And if such was the meaning of the parties (since contracts cannot be performed according to that meaning, because Confederate treasury notes ceased to be dollars when, by reason of the annihilation of the power which issued them, they ceased to be used as the money of any political community whatever), it follows according to the decisions in *Herbert et al v. Easton* (43 Ala. 550), and *Riddle v. Hill* (*supra*), that the measure of recovery in suits on account of such contracts is the value of the consideration, whether property, or Confederate currency, at the time of the making of the contracts.

This rule may not, in all cases of this sort, be defensible on strict legal principles; but it is not inequitable, and we consider it established by decisions of this court, to which we yield our adherence.

The judgment of the court below is reversed and the cause remanded.¹

¹ The opinion in this case was delivered at the January term, 1875, but in sending the MS. to the printer it was accidentally placed among the opinions of the June term following.

[Ex parte Owens.]

*Ex parte Owens.**Application for Mandamus.*

1. *Discontinuance; what does not constitute.* — Neither a criminal nor a civil proceeding is discontinued because the record fails to show continuances from term to term.

2. *Same; presumption of continuance.* — In the absence of some act of the party plaintiff, disclosed by the record, causing a gap or chasm in the proceeding, it will be presumed that it was regularly continued from term to term.

3. *Minutes; what not essential to validity of.* — The failure of the presiding judge to sign the minutes of the court does not affect their validity.

THIS was an application for *mandamus* to compel the judge of the 8th judicial circuit (Hon. H. D. CLAYTON) to strike from the docket the case of the *State v. Owens*, on the ground that it had been discontinued. The petition shows that the petitioner was indicted for assault and battery at the Fall term, 1868, of the circuit court of Pike, and at that term gave bond for his appearance as required by law. The case was regularly continued from term to term until the Fall term, 1869. At the Spring term, 1870, there is an order in the minutes continuing all cases not disposed of, but these minutes have never been signed. From that time until the Spring term, 1875, so far as the record shows, no proceedings whatever were had in the case. At the Spring term, 1875, the case was called, when the petitioner moved to have it stricken from the docket on the ground that it had been discontinued. The court overruled this motion and defendant excepted.

JOHN D. GARDNER and JOHN P. HUBBARD, for petitioner.

PER CURIAM. — The record does not disclose a discontinuance of the prosecution. When a cause civil or criminal is regularly introduced into a court of record, although continuances from term to term are not regularly entered as they ought to be, and a failure to enter them is a gross dereliction of clerical duty, they are presumed, unless the record discloses some act of the party plaintiff, by which a chasm in the proceedings is produced. *Drinkard v. The State*, 20 Ala. 9; 2 Brick. Dig. 369, § 112.

The failure of the presiding judge to sign the minutes of the court does not affect the validity of the record. *Bartlett & Waring v. Lang*, 2 Ala. 61.

The application for *mandamus* is denied.

[Taylor v. Woods.]

Taylor v. Woods.

Detinue before Justice of the Peace for Property exceeding Fifty Dollars in Value.

1. *Constitution, rules for construction of.* — A new constitutional provision adopted by a people already having well defined institutions and systems of law must not be construed as intended to abolish the former system, except in so far as in manifest repugnance to the new Constitution; and in determining the real scope and meaning of the new provision, it must be read in the light of the former law and the existing systems.

2. *Same; Art. VI. § 13 of, effect of.* — Thus interpreted Art. VI. § 13 of the Constitution is not an express grant of civil jurisdiction to justices of the peace, but was intended to limit their jurisdiction to controversies involving a sum not exceeding one hundred dollars, leaving it to the general assembly to determine the class of cases in which it shall be extended to or reduced below that point.

3. *Justice of the peace; jurisdiction of in actions of tort.* — The jurisdiction of justices of the peace in actions of tort never having been extended beyond fifty dollars by act of the general assembly, that officer has no jurisdiction of an action for the recovery of chattels in *specie*, where the value claimed exceeds fifty dollars.

APPEAL from Circuit Court of Sumter.

Tried before Hon. LUTHER R. SMITH.

Taylor, appellant, brought detinue before a justice of the peace against appellee, Woods, to recover a bale of cotton alleged in the complaint to be of the value of a hundred dollars. The justice of the peace having rendered judgment in favor of the plaintiff for the cotton, or \$80 its alternate value, an appeal was taken to the circuit court. In that court the defendant below, Woods, demurred, on the ground that it appeared from the papers filed in the cause that the specific property sued for exceeded fifty dollars in value, and the justice had not jurisdiction. It does not affirmatively appear from the record that the objection was raised before the justice. The circuit court sustained the demurrer, and hence this appeal.

COOKE & LITTLE, for appellant. — The objection to the jurisdiction was waived when the appellee went to trial without raising that question before the justice. Art VI. § 13 of the Constitution gives justices of the peace jurisdiction "*of all civil cases*" wherein the amount in controversy does not exceed one hundred dollars. This provision of the Constitution is declaratory, affirmative, and self-executing. The legislature has, therefore, no power to restrict the jurisdiction to fifty dollars in any class of cases. The statutes must give place to the Constitution.

GEORGE U. WALKER and JOHN T. WALKER, *contra*. — The Constitution of 1865 provided for the appointment of justices of the peace, "whose jurisdiction in civil cases shall be limited to causes in which the amount in controversy shall not exceed

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one hundred dollars." The words "in civil cases" as there used meant the same thing as the words "*in all civil cases*" used in the present Constitution. Yet under the Constitution of 1865 the jurisdiction was limited, in actions of this kind, to fifty dollars. The legislature in all its legislation on this subject has never lost sight of the difference between actions *ex contractu* and *ex delicto*. The law in the present sections of the Code has been of force under various constitutions, and indicates the significance and meaning attached by all departments of the government to the term "*civil cases*" as used in these different constitutions. This fact is of importance in determining the meaning in which the framers of the present Constitution used those words. If appellant's construction is right, the justice of the peace may take jurisdiction of libel and slander suits, trespass to try titles, &c.; the only restriction being that the amount in controversy does not exceed one hundred dollars.

BRICKELL, C. J. — The 10th section of the 5th article of the Constitution of 1819 (Clay's Dig. p. 35) declared: "A competent number of justices of the peace shall be appointed in and for each county, in such mode and for such term of office as the general assembly may direct. Their jurisdiction in civil cases shall be limited to causes in which the amount in controversy shall not exceed fifty dollars. And in all cases tried by a justice of the peace, right of appeal shall be secured, under such rules and regulations as may be prescribed by law."

This section was carried into the Constitution of 1865, without any other change than that the jurisdiction in civil cases was limited to causes in which the sum in controversy did not exceed one hundred dollars. Const. 1865, Art. VI. § 9; R. C. p. 42. The present Constitution declares: "A competent number of justices and constables shall be elected in and for each county by the qualified electors thereof, who shall hold office during such terms as may be prescribed by law. Said justices shall have jurisdiction in all civil causes wherein the amount in controversy does not exceed one hundred dollars. In all cases tried before such justices, the right of appeal shall be secured by law: *provided*, that notaries public appointed according to law shall be authorized and required to exercise, throughout their respective counties, all the powers and jurisdiction of justices of the peace." Const. Art. VI. § 13.

Justices of the peace, were at common law, subordinate magistrates, appointed by the king's special commission. They were conservators of the peace, and their judicial power referred to the administration of the criminal law. 1 Cooley's Blacks. 349. They were not clothed with civil jurisdiction;

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that is derived from legislative enactment or constitutional grant. *Marshal v. Betner*, 17 Ala. 832; *Ellis v. White*, 25 Ala. 540; *Williams v. Hinton*, 1 Ala. 297. When the Constitution of 1819 was formed, the Territorial Statute of 1814 (Laws of Ala. 510, § 1) conferred on justices jurisdiction of actions on contracts, when the amount in controversy did not exceed fifty dollars. A statute passed in 1829 conferred on them jurisdiction of actions on contracts for the payment of specific articles, or for the performance of services, when the amount in controversy did not exceed fifty dollars. Clay's Dig. 358, § 2. With the exception of the statute in reference to forcibly entry and detainer, and of special statutes, authorizing the recovery of penalties less than fifty dollars before justices of the peace, these statutes were the source of their civil jurisdiction until 1841. The test of this jurisdiction was, whether the action was in form *ex contractu* or *ex delicto*. If *ex delicto*, the justice had not jurisdiction. *Spann v. Boyd*, 2 Stew. 480. If the contract itself did not furnish the measure of the damages, or if the law operating on the contract did not fix the criterion, jurisdiction was excluded. *Cavender v. Funderburg*, 9 Port. 460. Of a purely equitable demand, if it exceeded twenty dollars, though less than fifty dollars, he had not jurisdiction. *Hall v. Cannte*, 22 Ala. 650. The true test of jurisdiction, as to the amount in controversy, was the amount actually due or claimed. *Crabtree v. Cliatt*, 22 Ala. 181. The statute of 1841 conferred on justices jurisdiction of actions for damages (except actions of slander), whether arising from tort or matter of contract, when the damages claimed did not exceed twenty dollars. Clay's Dig. 358, § 3. These statutes were substantially incorporated in the Code of 1852, and in all cases the jurisdiction extended to fifty dollars, without regard to the form or subject of the action; and jurisdiction of actions to recover specific property, the value of which did not exceed fifty dollars, was expressly given. Code of 1852, § 711. The Constitution of 1865, extending the limitation of civil jurisdiction to one hundred dollars, was not a grant of the jurisdiction *per se*. It was a mere authority to the general assembly to extend it, and until it was by legislative enactment extended, it remained as defined and regulated by the existing statutes. *Pearce v. Pope*, 42 Ala. 319. The act of February 20, 1866, now the first subdivision of § 841 of the Revised Code, increased the jurisdiction of justices in all actions founded on contract to one hundred dollars, leaving it in all other respects as it stood before the adoption of the Constitution.

The question presented by the record is, whether justices of the peace have jurisdiction of actions for the recovery of chat-

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tels *in specie*, the value of which, though exceeding fifty dollars, does not exceed one hundred dollars. The appellant insists the present Constitution, unlike the former constitutions, is an express, direct, immediate, grant of jurisdiction to justices in all civil causes wherein the amount in controversy does not exceed one hundred dollars, and in this respect varies from the former constitutions; that to clothe them with this jurisdiction legislation is not necessary, and legislation cannot narrow or circumscribe it. There is much force in the proposition; and the language of the Constitution, read by itself, and not in the light of the common law, or of former constitutions and existing statutes, would not only be capable of, but would admit of no other interpretation.

The Constitution is not the origin or beginning of law in the State. It was made by and for a people among whom the common law prevailed, so far as applicable to their condition, and not superseded or repealed by legislation or constitutional provision,—a people having a well defined, and well understood system of law, written and unwritten, statute and constitutional. It was not intended to abolish or destroy this system, and on its ruins raise up another, new and different. This system continues, except so far as it is repugnant to the Constitution, subject to such limitations and restrictions as it imposes. In the light of the former law and existing system, new constitutional provisions are to be read and interpreted, if their real meaning is ascertained, and the intent of the law-giver carried into effect. *Cooley Cons. Limit.* 60; *People v. Draper*, 15 N. Y. 537; *Ex parte Roundtree*, June term, 1874.

The section of the present Constitution, in reference to justices of the peace and constables, if read by itself, without reference to its connection with, or dependence upon the former constitutions and preëxisting statutes, would require the election of these officers by the whole body of the electors in the county, and not by the electors of the several precincts or election districts, voting for two justices confined in a large measure in the exercise of jurisdiction; and a constable having authority within the precinct or district. Limiting the electors to voting for only two justices, and one constable, for the precinct or district of their residence, and not for all justices and constables within the county, is a statutory requirement and regulation that would be directly repugnant to the constitutional provision, that “a competent number of justices and constables should be elected in and for each county by the qualified electors thereof, who shall hold office during such terms as may be prescribed by law,” if this was a new, original provision, introductive of officers in reference to which no former laws existed. When we read the provision in the light of for-

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mer constitutions and existing statutes, we cannot doubt as to its meaning. Former constitutions had not prescribed the mode of appointing or electing justices, and constables were purely statutory officers. The mode of election or appointment of either officer was a matter of legislative power, and could have been intrusted to the governor, reserved to the general assembly, or committed to any of the recognized agencies or judicial tribunals of the State or county. Or, as was done by the general assembly at its first session in 1819, transferred to the qualified electors residing within each captain's beat. Laws of Ala. 519, § 1. The policy of the present Constitution is, that all officers recognized in it shall derive their appointment from an election by the people among whom they are to exercise official power. In obedience to this policy, this provision, departing from former constitutions, makes an election the element of a justice's or constable's appointment. It was the element under the statutes. All the electors of the county are to have a voice in the election. They have it in electing the justices and constables of the districts in which they reside. Thus, the constitutional provision, interpreted in connection with the former constitutions and the statutes, is satisfied. The intention of its framers is fully accomplished, though the words in the larger and broader import they bear in other clauses, and which they would ordinarily receive, may not be observed. In their larger import the jurisdiction of the justice would be coextensive with the county: the place of residence of the defendant, or of the contracting of the debt, would not be material if it was within the county. The general law, from the earliest periods of our legislative history, has confined and now confines the jurisdiction to the precinct of the defendant's residence, or the precinct in which the debt was contracted. R. C. § 3209. This is upon the same policy that a defendant must be sued in the county of his residence.

Civil jurisdiction of a justice is not derived from the common law. It originates in, and depends upon constitutional warrant or statutory enactment. The jurisdiction in the present Constitution is "in all civil causes." So it was under the former constitutions. The term comprehends every cause which is not criminal. All causes, whether in equity or at law, had but two grand classifications, civil and criminal. The latter comprehends only violations of the criminal law, — causes at the common law, in which the crown, or with us the State, complains of violated law and broken peace, in which all individual right and interest are lost, and merged in the greater right and interest of the sovereign. Civil causes had parties, individual suitors, whose rights and wrongs were the matter of controversy. They embraced every action at law and every suit in equity, whether

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it sprung from contract or from tort; whether the form of action for the injury was *ex contractu* or *ex delicto*. If this clause of the Constitution is interpreted in the broadest meaning of its words, it would follow that justices had the jurisdiction of a court of equity, when the amount in controversy did not exceed one hundred dollars. They could enforce the specific performance or rescission of contracts, whether relating to land or personal property. The character of the equity involved would not be material. The amount involved would be the test of jurisdiction. So of every action for tort, though sounding in damages merely, of which the law has no standard, but leaves to the discretion of a jury, to be measured by the circumstances of each case, — if the amount claimed does not exceed one hundred dollars. Actions of slander, from jurisdiction of which they have always been excluded, would be embraced by the general words employed in the Constitution. Such a radical change in the legislation of the State, commencing in its territorial existence, is not to be inferred. It must be apparent from the force of the terms of the Constitution. No reason can be assigned for such a change. No mischief has resulted from the limitations placed by legislation on the jurisdiction of justices. Public convenience, the speedy collection of debts, not exceeding in amount one hundred dollars, it was supposed, would be promoted by the extension of jurisdiction in matters of contract. Therefore the Constitution of 1865 authorized the extension, and legislation put the jurisdiction in exercise as to the matters of contract. Then came the present Constitution, and its framers intending to express in it only that expressed in the former Constitution and the existing statutes, employed the general phrase, "all civil causes." We do not doubt they were employed for this purpose only, and not in the larger sense which would work a radical change in the law of the State from which no public mischief had resulted, but which is really promotive of the public good and of private interest. Actions for tort are invariably litigated, — the matter of vehement controversy between the parties. The judgment of the justice would but be a step in the litigation, conducting it to a higher tribunal. Litigation would not be quieted but protracted, and costs multiplied, by conferring the jurisdiction in such cases. This evil would be less probable and less frequently incurred, when the amount in controversy was small. Therefore the statute of 1841 confined the jurisdiction in actions for tort to twenty dollars, and subsequent legislation to fifty dollars, and beyond that sum it has never been extended. The true meaning of the Constitution is, that the civil jurisdiction of justices shall be limited to controversies involving an amount not exceeding one hundred dollars; that the general

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assembly shall determine the class of cases in which it shall be extended to, or reduced below that point. It follows, under the present statutes, a justice has not jurisdiction of an action for the recovery of chattels *in specie*, when the value claimed exceeds fifty dollars. The ruling of the circuit court was, therefore, correct, and its judgment is affirmed.

Corbitt, Administrator, v. Clenny et al.

Bill in Equity to enforce Vendor's Lien.

1. *Order of confirmation of sale of decedent's lands; when void.* — Where a sale of a decedent's lands in a body has been made under order of the probate court, and regularly reported to and confirmed by it, an order to convey title to any portion of it before the entire purchase-money has been paid is a nullity.

2. *Purchaser; what charged with notice of.* — A purchaser buying real estate, of the title to which there must be evidence in writing, is chargeable with notice of any infirmity of his title which the writing discloses.

3. *Practice; when brief is not filed.* — The court, while desirous of the aid to be derived from briefs of counsel, does not feel at liberty to decline considering questions presented only by an assignment of error.

APPEAL from Chancery Court of Henry.

Heard before Hon. B. B. McCRAW.

The facts are sufficiently stated in the opinion.

J. A. CORBITT, for appellant.

OATES & BRO., *contra*.

MANNING, J. — Appellant in this cause was complainant in the court below, as administrator *de bonis non*, &c., of Thomas Griffin, deceased.

A former administrator had sold lands of the intestate, 240 acres, in one body, to three sons of the deceased, Dempsey, Daniel, and Thomas Griffin, as joint purchasers, for which they had executed to him their joint note for \$1,140, payable twelve months afterwards. The sale was regularly made pursuant to an order of the court, and was reported to and confirmed by it. This was in 1866.

The three purchasers having made a division of the land among themselves, and another brother, John Griffin, having become administrator *de bonis non*, &c., of the estate, and holder of the note as such, — he, on the 25th of November, 1870, reported to the court that the purchase-money for the E. $\frac{1}{4}$ of the N. E. qr. of sec. 33, township 8, range 27, which had been sold by order of the court, as property of the estate of his intestate, had been fully paid by Dempsey Griffin, the pur-

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chaser thereof; wherefore he prayed an order of the court authorizing him to make title to said Dempsey; and responsively to this, the court ordered the administrator to make title accordingly. Neither in the report, nor in the order of the court, was any mention made of the rest of the land, or of the fact that it was all sold together to three joint purchasers; nor was any mention made of the amount which Dempsey Griffin paid for the parcel of land mentioned. On the same 25th of November, 1870, John Griffin, as administrator *de bonis non*, &c., made a deed of the land to Dempsey Griffin; and he, on the same day, made a deed of it and of another parcel to defendant, Samuel J. Clenny.

A partial payment had been made of the note of Dempsey, Daniel, and Thomas Griffin, though how much does not appear; and a judgment was obtained against them for the residue, — on which execution had been returned "No property found." Complainant therefore prayed for a sale of the land — first of the portions not sold to Clenny, and then of that, if necessary, — to satisfy the judgment and pay the purchase-money.

The bill charges that Clenny knew that the land had been sold in a body, and purchased jointly by the three brothers; that the whole of the purchase-money had not been paid; and that John Griffin then held the note against the makers of it. Answer under oath is waived.

Clenny files an answer, — or rather one not signed by him is filed for him, by his solicitors, — in which all the material facts are admitted to be true; except that he, Clenny, had any knowledge of the facts that all of said lands had been sold in one body to three persons jointly, that the purchase-money had not all been paid, or that John Goodwyn, the administrator, held against them their unpaid note for the purchase-money. All knowledge, and any information of these facts, either at the time of his, Clenny's, purchase, or at the time of the payments he had made, are denied in the answer. In it he claims to be a *bonâ fide* purchaser for value without notice; says that in the purchase the eighty acres parcel in controversy was valued at \$500, and the other parcel was valued at \$140; that he gave therefor his note for the whole \$640, and a short time thereafter paid to said Dempsey Griffin \$500, which was paid and received as the price of the parcel in controversy; and that he had since made a further small partial payment of the residue. He avers also that the report aforesaid and order of court authorizing title to be made, and the deed of the administrator to Dempsey Griffin, were shown to him, and that he was assured by the administrator and Dempsey Griffin — and believed — that the latter had a good title to the land. Exhibits are made of the report, order, and deed, and also of

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the deed of Dempsey Griffin and his wife, to Clenny. The cause was heard upon bill, answer, and exhibits, without any depositions or other testimony.

Decrees *pro confesso* were taken against the other defendants.

By section 2096 of the Revised Code it is enacted, in reference to such sales made under order of the probate court: "When the purchaser has paid the whole of the purchase-money, on his application, or that of the executor or administrator, the court must order a conveyance made to such purchaser by such executor or administrator, or such other person as the court may appoint, conveying all the right, title, and estate which the deceased had in such lands at the time of his death." The reservation of title until payment, thus provided for, was intended as a security for the purchase-money; and the record in the court of the proceedings for the sale, and of the report of it, contained information accessible to every one of the property sold and price to be paid for it. Until payment of "the whole of the purchase-money,"—due for any body of lands embraced in the sale to any particular purchaser or purchasers, the court was not authorized to cause title to any portion thereof to be made. Its subsequent order to complete the title must be predicated upon the previous report and confirmation of the sale; which sale is to be perfected and completed by the order,—not varied or otherwise affected by it. The probate court has not the power to split up one entire sale into several separate ones,—or, by charging one parcel of the land embraced in it with one portion of the purchase-money, and another parcel with another, to discharge, upon payment of any of these portions of the price, the corresponding parcels of land from liability for the residue, and order title to be perfected to them. The security which the law requires is security not for a part, but for the whole of the price, and cannot be thus diminished. In this case the court did not, at least expressly, undertake thus to split up one entire transaction.

The report of the administrator is so drawn as not perhaps to make him chargeable with perjury in any statement in it. Yet, addressed to the judge of probate, and relating to a transaction alleged to have been done in the administration of Thomas Griffin's estate, it plainly imports what is not true, to wit: that a sale of that particular parcel of land had been made under the order of the court, and been confirmed by it, to Dempsey Griffin for a definite price, which had been wholly paid by him to the administrator. The order of the court authorizing the administrator to make a deed to Dempsey Griffin, can operate only on such a particular sale to perfect it.

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But no such sale was ever made, and the order to perfect it by a conveyance of title, having nothing to operate on, is void.

The report, moreover, specifies no amount as paid by Dempsey Griffin,—which omission would not perhaps have been material, if the record showed that such a sale as the report indicates had in fact been made, reported to the court, and confirmed; for then it would appear by the record what the amount was. As it is, the court has inadvertently, we presume, made an order which is void, because it relates to a transaction that had never taken place.

Defendant Clenny seeks to protect himself against the lien on the land, on the ground that he is an innocent purchaser without notice. Upon the hearing in the court below, his answer had not the effect of evidence, except so far as it admitted what was charged in the bill, or facts in support of it. And though competent to testify, he has not undertaken as a witness to support the averments of matter in avoidance in his answer. This answer shows that the report, above considered, of the administrator to the probate judge, and the order thereupon, and the conveyance by the administrator to Dempsey Griffin, and that of said Griffin to defendant Clenny, were simultaneous,—at least, that all of these acts were done on the same day. And Clenny says also that before the conveyance was made to him, he examined the report of the administrator that day filed in court, and knew the handwriting as that of a person in whom he had confidence. Mr. Clenny then doubtless saw it among the papers of Griffin's estate in the court, where it was that day filed and acted on. It would be singular if he did not then, also, inform himself what the same record exhibited in reference to the sale by the administrator, as to the manner in which it was made. In the absence of his testimony to the contrary, the fair inference would be that he knew the facts of that transaction. Whether he did or not, however, is not a matter of consequence. He was buying real estate, of the title to which there must be evidence in writing; and he is chargeable with notice of any infirmity of the title which such writings would have disclosed. It was his fault if he did not examine them and see that there was a lien on the land he bought, for the payment of the note described in the bill of complaint; and he therefore took the land subject to that lien.

The chancellor erred in dismissing the bill as to Clenny, and charging the costs in his favor against complainant. If the other lands in possession of the purchasers from the administrator are not sufficient to pay the balance due of the original purchase-money, the land bought by Clenny should be subjected to the payment of it.

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Our attention has been called to the facts that no brief has been filed, and no argument made on behalf of appellant in support of his assignment of errors ; and it has been suggested, upon an authority cited, that we ought, therefore, to affirm the decree below, without an examination of the record. Although desirous to have the aid to be derived from a clear and candid statement of the case and argument on behalf of each party in a cause, from counsel who have studiously investigated it, we do not feel at liberty to decline considering questions that are presented to us by an assignment of errors only.

For the errors indicated the decree is reversed and cause remanded.

The State v. Mills & Breitling.

Action on Bond.

1. *Art. IV. § 32 of Constitution ; what does not apply to.* — The thirty-second section of Art. IV. of the state Constitution is not restrictive of the power of the general assembly to compound, release, or discharge debts due the State. This power is the same over all debts no matter how originating, and must of necessity reside in some department of the government. Under the Constitution there is no other repository of the power than the general assembly.

2. *Act compounding debt due the State ; what not essential to validity of.* — It is not essential to the validity of an act compounding or releasing a debt due the State that it be passed by a vote of two thirds of the members of each house.

3. *Art. IV. § 32 of the Constitution ; to what applies.* — Art. IV. § 32 of the Constitution has no application to dealings between the State and its officials and employees, charged with the collection, keeping, or disbursement of its revenue. It should be so construed so as to prevent the general assembly from effecting in an indirect manner the things conditionally prohibited in that section — as by a loan by a two thirds vote, and a subsequent release of the debt thereby created in favor of the State, by a majority vote. (Per MANNING, J., concurring.)

APPEAL from Circuit Court of Marengo.

Tried before Hon. LUTHER R. SMITH.

The facts are sufficiently stated in the opinion.

W. H. and R. E. CLARKE, for appellant. — This act is the “giving away” of money due the State without complying with the Constitution. What cannot be directly done is forbidden to be done by indirection. *Haley v. Clark*, 26 Ala. 439. If this act be valid the Constitution can always be violated with impunity. Two thirds of the members of each house may make a loan which is well secured, and a majority afterwards release the debt. This is as effectually giving away the money of the State by a majority vote, as if it had been done or attempted by a direct vote for that purpose, in the first instance.

EUGENE MCCA, *contra.* — This act is not within the mis-
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chief to be prevented. Ever since Alabama has had a legislature, it has uniformly exercised this power of granting relief to debtors, whenever from motives of justice or policy it was deemed advisable. Some department of government in every civilized community must have the power to release debts. This uniform practice shows the construction which should be put upon the act. Smith's Commentaries on Stat. & Con. Law, p. 436.

BRICKELL, C. J. — The intestate of the appellees, Gottlieb Breitling, was a surety on a bond executed by the "Marengo Plank or Covered Road Company," payable to the governor of the State, for a part of the two per cent. fund loaned to the company under an act of the general assembly. After the commencement of this suit, the general assembly passed an act entitled "An act for the relief of A. M. Mills and F. S. Breitling, administrators with the will annexed of Gottlieb Breitling, deceased, late of Marengo county," approved December 6, 1871, whereby they are "released from all claims or obligations to the State of Alabama, for and on account of that portion of the two per cent. fund loaned to the Marengo Plank or Covered Road Company, by Henry W. Collier, Governor of the State of Alabama, under and by virtue of the act of the 9th of February, 1850." Pamph. Acts 1871-2, p. 158. As a full release from liability on the bond, this statute was by appellees pleaded *puis darrein continuance*, in bar of the suit. The plea was demurred to, and the causes of demurrer resolve themselves into a denial of the constitutionality of the act. The question was, however, more fully presented on the evidence, it appearing the act was not passed with the concurrence of two thirds of the members of each house, on votes taken by yeas and nays, and entered on the journals. The constitutional provision, supposed to be offended in the passage of the act, is the 32d section of the 4th article, and reads as follows: "The general assembly shall not borrow or raise money on the credit of this State, except for purposes of military defence against actual or threatened invasion, rebellion, or insurrection, without the concurrence of two thirds of the members of each house; nor shall the debts or liabilities of any corporation, person or persons, or other States be guaranteed, nor any money, credit, or other thing be loaned or given away, except by a like concurrence of each house; and the votes shall, in each case, be taken by the yeas and nays, and be entered on the journals." The release of the debt created by the bond, it is argued, is the giving away of a credit or other thing, which can only be done in the manner pointed out, — by the concurrence of two thirds of the mem-

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bers of each house, voting by yeas and nays entered on the journals.

The capacity of contracting, of incurring liabilities, and of having debts and liabilities incurred to it, is an incident to the general sovereignty of the State. The government cannot be conducted without revenue. This must be collected, kept, and disbursed. In the collection, safe keeping, and disbursement, the agency of officers is indispensable. Guarantees for their fidelity must be taken. These guarantees will sometimes be broken, and thereby a debt or liability to the State will be created. The general assembly has full legislative power over the public revenue, unless restrained and limited by the Constitution. Debts due the State they may compound, release, or discharge, on such terms and in such manner as it may seem to them the public good requires. This power they exercise at nearly every session, by compounding, releasing, or discharging the liabilities of public officers and their sureties, for defaults in the collection or safe keeping of the public revenue. It is a highly beneficial power to the State and to the individual citizen. A default in the safe keeping, collection, or disbursement of the public moneys may not have been wilful, but attended by such circumstances as render it eminently just that the State should not stand on the letter of the bond, and demand full reimbursement; or it may have been wilful, and the precarious condition of the debtor and his sureties may require that a compromise should be made rather than incur the risk of losing all, at the termination of litigation for its recovery; or facts may exist rendering the right of recovery doubtful. A restraint or limitation of the legislative power over the debts due the State arising from defaults of officials charged with duties in reference to the public revenue would be unwise, and could produce only injury to the State. No such restraint or limitation has been supposed to exist, nor is any imposed by the section of the Constitution to which we have referred.

The power the general assembly may exercise over debts or liabilities arising from defaults in the collection, keeping, or disbursement of the public revenue, may be exercised over every public debt in which the State has the beneficial ownership, no matter how it originates, or on what consideration based. The power of necessity resides somewhere, and there is under the Constitution no other repository of it. The two per cent. fund is a trust fund, because the act of Congress donating it, and the act of the legislature accepting it, devote it unconditionally and absolutely to a specific purpose—the internal improvements particularly mentioned. The State is, nevertheless, the trustee and *cestui que trust* of the fund,

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charged in conscience with its faithful application. While the fund is in the keeping of the State, and its appropriation not practicable, commingling it with the State's other funds is not a conversion, nor a loan of it would not be a breach of the confidence reposed in the State. If considerations arise which the general assembly deem sufficient to justify it, why should not the borrower be released from his obligation to pay? The duty of the State to devote the entire fund received to the specific purposes to which it is appropriated is not diminished. The State can claim no exemption from the duty because it has not collected the money loaned. The State is a trustee of the sixteenth section granted by Congress, for the use of schools. But the State is a mere trustee, holding only the legal title in trust for the inhabitants of the several townships in which the lands are situate. The inhabitants of the township, not the State, are the *cestuis que trust*. *Long v. Brown*, 4 Ala. 622. Hence it was held in *Hardy v. Br. Bank Montgomery* (15 Ala. 722), that the legislature could not by mere enactment rescind or annul a contract for the sale of the sixteenth section, without the assent of the inhabitants of the township, or a majority of them. The difference between that case and the present is manifest. The State is trustee and *cestui que trust* of the two per cent. fund, and bound to its faithful application to a specific purpose. A loan of it may not be a conversion, nor will a release of the borrower from liability diminish the fund, or lessen the obligation resting on the State. A release of the purchaser of the sixteenth section from his obligation to pay the purchase-money would diminish the fund, in which the inhabitants of the township have the sole beneficial interest. The power of the legislature, unless restrained and limited by the clause of the Constitution referred to, was ample to release the appellants from liability on the bond. No injury results from the release, other than that which results whenever a debt arising from a default in the collection, safe-keeping, or disbursement of the public revenue is released — a diminution of the resources of the State to meet its liabilities.

With the power of the general assembly over debts due the State the section of the Constitution under consideration was not designed to interfere. It was intended primarily to impose a check or restraint on the power of the general assembly to contract debts or liabilities direct or indirect in the name of and obligatory on the State. It next proposed to restrain the power of the general assembly to loan or give away the moneys, credits, or other things of the State. The evil to be avoided was the incurring of debts and liabilities in the name of and on the credit of the State. These had been incurred in

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times past for banking. It had been often proposed they should be incurred to aid various schemes of internal improvements. It had been proposed to guarantee the liabilities and debts of corporations, engaged in such schemes, and sometimes to loan, or give them money, or credits of the State. While the general assembly is not prohibited from exercising full power in this respect, the exercise must be with the concurrence of two thirds of each house, voting in the manner prescribed. Thereby greater care, and greater responsibility in the representative in the exercise of the power is secured. The release of a debt due the State is not within the mischief to be guarded against. It is not a loan or a gift. It is the mere waiver or abandonment of a right or claim, or the discharge of a cause of action. The constitutional provision may operate on mere donations of money, credit, or other thing of the State. A release, though it may be voluntary, is in effect a contract. It is always supported by, or in legal contemplation has a consideration; when made by an individual, after breach of a contract, it must be under seal, and the seal imports the consideration. 2 Chitty on Con. 1145. An act of the general assembly releasing a debt due the State is the most solemn form a release of such debt could assume, and must have the legal efficacy attached to a release under seal, executed by an individual. Against contracting debts, or loans, or gifts, the constitutional provision is expressly directed. A release of a debt due the State cannot be construed into either. It is different in its nature and character, and has in common language, and legal signification, nothing in common with either. The judgment of the circuit court is affirmed.

MANNING, J.—I concur in the conclusion and judgment announced by the Chief Justice. The liability to which the act of the general assembly pleaded in this cause relates is an old one, arising out of a transaction that took place many years ago, long before the Constitution of 1867–8 was framed. At that time it was a mere claim against the estates of deceased persons, and, perhaps, against a few living individuals who had been sureties for the defunct corporation, for whose benefit a loan of a small amount of the two *per cent.* fund had been made by the State. I am of opinion that this claim was not within the inhibition and restrictions of § 32 of Article IV. of the Constitution of 1867–8.

That section, however, or the part thereof in these words, "Nor shall the debts or liabilities of any corporation, person or persons, or other States, be guaranteed, nor any money, credit, or other thing be loaned or given away, except by a like concurrence of each house," ought to be so construed as to pre-

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vent the accomplishment of any of the things thereby conditionally prohibited, — indirectly, or by two separate acts of the general assembly ; as for instance a loan by a two thirds vote, and a release of it afterwards by a mere majority vote, as well as directly, by a single act passed by a mere majority.

The section referred to does not relate to dealings between the State and its official employees, such as tax-collectors and other agents. It was intended to hinder the legislature from being easily persuaded by plausible schemes of internal improvement or public benefit, or inconsiderately urged by influences temporarily potent from alienating or intrusting to individuals or corporations the revenues or credit of the State.

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Motion to dismiss Appeal.

1. *Appeal ; what will not support.* — No appeal lies from an order of court imposing payment of costs as the condition upon which a new trial is granted. The effect of such order, so long as it stands, is to suspend execution of the judgment and deprive it of its properties of a final decree which will support an appeal.

2. *Practice as to grant of new trial.* — If the party in whose favor the new trial is granted is unwilling to accept the terms imposed, he should have an entry to that effect made on the minutes or have the order annulled. Incorporating an exception to the grant of the new trial in the bill of exceptions is not a rejection of the terms imposed, but indicative rather of an intention to rely on the exception ; and that failing, to comply with the order and claim the new trial under it.

THIS was a motion to dismiss the appeal because no final judgment had been rendered in the court below. The facts upon which it is based are set forth in the opinion.

SNEDICOR & COCKRELL, for motion.

ROBT. H. SMITH and THOS. H. COBBS, *contra*.

MANNING, J. — Appellant was plaintiff in the circuit court of Sumter county, in an action of trover against appellee ; and at the Fall term, 1873, a verdict and judgment were rendered for defendant ; whereupon plaintiff took a bill of exceptions, and moved also for a new trial. This latter motion was "granted upon the condition that the costs of suit are paid by plaintiff," as the record recites ; and an exception to this ruling of the court is also contained in plaintiff's bill of exceptions. There is no entry of record showing that the order of the court granting the motion for a new trial upon condition of the payment of the costs by plaintiff has been set

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aside on motion of either party, or otherwise discharged. The case is brought by appeal of the plaintiff to this court, and the motion is to dismiss the appeal.

We find from the certificate of the clerk of the circuit court that the appeal was taken by plaintiff below in January, 1874, before the next term of the court after the proceedings above mentioned were had.

The effect of the order granting a new trial upon the condition annexed by the circuit court was to keep the cause *sub judice* in that court till the next term thereof. *Ex parte Lowe*, 20 Ala. 330.

If nothing else be done, the cause is then still subject to the control of the court, and any proper lawful order may be made therein. If none be made during the term, the cause would stand, at the adjournment of the court, in the same plight and condition as at the commencement. The judgment upon the verdict is suspended by the conditional order for a new trial, and therefore not final.

It is insisted that plaintiff, by the objection he made to the conditional order and the exception thereto embraced in his bill of exceptions, signified his intention not take the new trial, and that the order therefore should be held to have been discharged. We think it would clearly have been proper for the court, when the exception was brought to its notice, to revoke the order, and put the plaintiff to his appeal to reverse the judgment, upon the supposed other errors of the circuit court. But this was not done. The plaintiff reserving an exception to the order on the ground that it was conditional, appeals to this court, and here assigns error thereupon. This indicates a purpose to rely on that exception; and if not sustained therein, might he not have intended to go back and pay the costs, and claim the reinstatement of the cause for trial?

If he intended to repudiate the conditional order for a new trial, he ought to have had an entry to that effect made on the minutes of the court below, or the order vacated, and not have put the matter into a bill of exceptions, in order that its validity might be tested in the court.

No appeal lies to the order of the court imposing the payment of costs as the condition of a new trial, — the decision of the court thereupon not being revisable.

The effect of the order while it stands is to prevent the judgment upon the verdict from being definitively determined; and it is only upon a judgment final in such a case that appeal will lie.

The motion to dismiss the appeal is therefore, granted.

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Statutory Proceeding to compel the Delivery of Books and Papers.

1. *Duty of delivering property of office to successor; ministerial merely.* — The duty resting on every public officer, on the termination of his official relations, to surrender to his successor the official papers and *paraphernalia* of the office, is ministerial merely, no matter upon what officer it devolves, and at common law could be enforced by *mandamus*.

2. *Statutes to compel delivery of property, &c.; how proceedings under are conducted.* — The statutes to compel the delivery of books and property by public officers to their successors are summary, and designed to give a more certain and expeditious remedy than that existing at common law. The proceedings are not to be conducted as in ordinary adversary suits between private individuals, and are not governed by the same restricted rules of pleading.

3. *Same; probate judge amenable to.* — It is in his ministerial capacity that the judge of probate is intrusted with the custody of the records and property of the office, and as such he is as amenable to proceedings under the statute to compel their delivery as any other officer.

4. *Circuit judge, jurisdiction of, to exact additional bond; what not impaired by.* — The passage of the act of November 3, 1862 (§ 784 R. C.), giving chancellors and supreme court judges concurrent authority with the circuit judge to approve the probate judge's bond, does not withdraw him from the influence of § 174 of Revised Code, which empowers the circuit judge to exact an additional bond in certain contingencies of probate judges or other officers, whose bonds "are required to be approved by a circuit judge."

5. *Order for delivery; what title will support.* — A *prima facie* title to the office, free from all reasonable doubt — a title to which the law attaches the possession of the office, and a right to exercise its functions — must be shown before the judge will make the order, under the statute, to compel the delivery of the books and property of the office.

6. *Same; what best evidence of prima facie title.* — A commission of the governor, granted on a certificate of election, or founded on a proper certificate disclosing a vacancy, is the highest and best evidence of who is the officer, until the ultimate right to the office is determined on *quo warranto*.

7. *Statutory proceeding; what evidence inadmissible in.* — The circuit judge exercises power judicial, or in its nature judicial, in refusing to approve the bond of a probate judge, and his action cannot be collaterally assailed in a proceeding to compel the delivery of books and property of the office.

8. *Probate judge, office of; statutory.* — The office of probate judge is not created by the Constitution, but exists and its character is defined by statute. The various bonds required of him are not exacted as pledges for integrity and fidelity in the discharge of his judicial functions, but as a guaranty for his responsibility and diligence in the performance of his ministerial duties.

9. *Same; what amounts to abandonment of office.* — The failure to give the bond required by law as the condition precedent to entering upon the discharge of the duties of the office, is in legal contemplation a failure to accept; and the failure to give the additional bonds, when required, is a refusal to perform the condition on which the right to continue in the office depends, and is an abandonment of it.

10. *Same; what not removal from office in meaning of the Constitution.* — In either case the failure to give the bonds required is the voluntary act of the judge himself, and the vacancy thereby occasioned, when enforced against him, is in no legal sense a "removal from office" within the meaning of the Constitution, or otherwise violative of its provisions.

11. *Order compelling delivery of books and property; appeal lies from.* — The order which the circuit judge makes to compel the delivery of books and property in the statutory proceeding is of like nature with *mandamus*, and is embraced in the general words, other "remedial writs used in the act of December 15, 1868, authorizing appeals from judgments of circuit court judges on application for *mandamus* and other remedial writs."

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THIS was a statutory proceeding commenced by the appellee, P. S. Holt, against the appellant, Benjamin Thompson, before Hon. J. E. COBB, judge of the ninth judicial circuit, to compel the delivery of the books, papers, and property appertaining to the office of probate judge of Macon county, which office it was alleged Thompson had vacated, by the failure to give an additional bond required of him.

Holt's petition, sworn to by him, alleges that he is a citizen of Macon county, and on the 16th day of November, 1875, was duly appointed and commissioned, by the Governor of Alabama, judge of the probate court of Macon county, Alabama, to fill a vacancy caused by the failure of Benjamin Thompson to make and file an approved bond, as judge of probate, as required by law; that petitioner had given an approved bond, and duly qualified in all respects according to law, and is now probate judge of Macon county; that as such judge, and as the duly qualified successor of said Thompson, he had demanded of Thompson the books, papers, and property, &c., appertaining to the office, which demand said Thompson refused, and since then he unlawfully detains said papers and books. It ended with a prayer for an order to Thompson to appear and show cause why he should not be compelled to deliver up the books, &c., and the circuit judge accordingly made the proper order.

On the day set for the hearing, Thompson appeared, and moved to dismiss the complaint and to quash the order, upon the ground that the statutes, under which the proceedings were based, did not and were not intended to apply to cases where the books and property pertaining to the office of probate judge were involved; that the probate judge was a constitutional officer, and could not be deprived of the books and papers in this summary proceeding. The circuit judge overruled these motions, and the defendant excepted. The defendant then demurred to the petition and order to show cause, on the same grounds on which the motion to dismiss was based, and also because it was not stated in what county or circuit defendant Thompson resided when the complaint and order to show cause were made, and because the facts stated in the complaint did not authorize the judge to make any order in the case. The circuit judge overruled the demurrer, and the defendant duly excepted.

Thompson then filed an answer stating in substance his election as probate judge in November, 1874, for the term of six years, and that he duly qualified, was commissioned, and gave a bond, as probate judge, in the proper penalty, &c., which was approved on the 20th day of November, 1874, by Hon. R. C. BRICKELL, a justice of the supreme court. On the 12th of December, 1874, he gave a bond as judge of the county court,

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which was duly approved by Hon. J. E. COBB, judge of the ninth judicial circuit. Both of these bonds were filed as required by law. Afterwards, on the 15th of December, 1874, an order from Hon. J. E. COBB, circuit judge, was served on Thompson, to appear on the 28th of the same month, and give an additional bond. This order was founded on the address of three members of the commissioners' court. On the 28th of November, Thompson presented to the judge an additional bond, in proper penalty, signed by himself, J. T. Menifee, W. B. Bowen, R. E. Thompson, and J. A. Grimmitt, and this bond was duly approved by the said circuit judge. Afterwards, on the 11th day of January, 1875, the defendant received another requisition, based on the address of four members of the commissioners' court, "erroneously averring that defendant's official bond was worthless and insufficient, for certain reasons therein alleged," which the answer states were unfounded in fact. The judge extended the time in which to give an additional bond until the 15th of February, 1875, and on that day defendant tendered said circuit judge a bond of ten thousand dollars for his bond as probate judge, and a bond for five thousand dollars as county judge, both bonds being in proper form, &c. These bonds were signed by W. C. Thompson, L. M. Jones, and S. P. Thompson, of Bullock county, and J. C. Thompson, J. F. Thompson, W. C. Vaughan, and J. T. Menifee, of Macon county, as sureties, who duly testified that they were worth, over and above all debts, liabilities, and exemptions, a sum greatly in excess of the penalty of the bonds, and the answer alleges this to be a fact.

The answer alleges that by reason of having to hold a court about this time, the circuit judge did not have sufficient time to make proper investigation as to the bonds, but upon the investigation made refused to approve them, and a vacancy in the office was then certified. The answer further alleges that after the approval of the first bonds aforesaid by the circuit judge, the commissioners' court, or the members thereof, had no power to make the address under which the last requisition for a bond was served on petitioner, no change having taken place in the condition of the sureties or the principal. The answer further alleges that the office of probate judge being created by the Constitution, and defendant having given good and sufficient bonds, &c., he can only be deprived of the office in the mode and manner prescribed by the Constitution. The answer also denied all the allegations of Holt's petition. It was admitted that Holt was appointed, commissioned, gave bonds, and qualified as stated in the petition, and had made demand for books, &c., which was refused. Thompson's election, commission, and qualification and induction into office,

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&c., as stated in his answer, were admitted, and also that on the last requisition for bonds, which bonds the circuit judge refused to approve, a certificate of vacancy was duly certified, made out, and forwarded to the governor, who thereupon commissioned Holt. "It was also admitted that the judge made the order to show cause in this proceeding after being satisfied from the oath of complainant that the books and papers were detained by defendant." The defendant then offered to prove the entire sufficiency of the bonds tendered the circuit judge on the last requisition, which bonds the judge had then refused to approve. The circuit judge, on the objection of the plaintiff, refused to allow any evidence to be introduced touching the sufficiency of the said bonds, and the defendant duly excepted. The judge then made the statutory order requiring the delivery of the books and papers, and ordered defendant to be committed to jail until he delivered them up, the defendant not having made affidavit as required by the statute.

The defendant prayed an appeal, and giving bond in the sum fixed by the said judge for costs, and "also for damages, &c., as contemplated by the act of 1868," the appeal was allowed and a *supersedeas* of the order granted until the disposition of the appeal.

The various rulings to which exceptions were reserved, together with the order made by the circuit judge to compel the delivery of the books, &c., are now assigned as error.

While the case was pending the appellee moved to dismiss the appeal on the ground that there was no law authorizing it.

RICE, JONES & WILEY and G. W. GUNN, for appellant. — The statutes under which this proceeding is based are utterly void if they apply to a constitutional officer. The entire subject of removal of the probate judge, *after* his election, commission, qualification, and induction in office, he being eligible at that time, is *exclusively* committed by affirmative modes to the general assembly, and in some instances to the general assembly and governor combined. No other department of the government can remove him from office; or lay the predicate for removal by any action requiring a new bond. The constitutional mode is the only mode. *State ex rel. v. Gardner*, 43 Ala. 234; *People v. Du Bois*, 23 Illinois, 547; *Commonwealth v. Gamble*, 52 Pa. State, 343; *Ferris v. Higley*, 20 Wallace, 375; *Lowe v. Commonwealth*, 3 Met. (Ky.) 240; *Hoke v. Henderson*, 4 N. C. 14; *Thomas v. Owen*, 4 Md. 190; *State v. O'Driscoll*, 3 Brevard, 526; *People v. White-side*, 23 Wendell, 9; *Johnson v. Wilsondale*, 2 N. H. 202; *Cooley Con. Lim.* 79-90. No matter what inconvenience may result from this construction, it is a sufficient answer to them

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all that *ita lex scripta est*. The jurisdiction conferred by these statutes is summary. Every fact necessary to uphold it must affirmatively appear. The petition does not show in what county Thompson resided. Under the statute the judge has no jurisdiction except in the county of the *defendant's residence*. The petition, failing to aver this, was defective, if not void. Surely Thompson, when it was attempted to eject him from office in this summary proceeding, had the right to show that he had done all the law required, and tendered a sufficient bond. No right can be lost by the failure of a public officer to do his duty, when the defendant has done all he could to have the bond approved. *Ex parte Mitchell*, 39 Ala. 442.

The present case shows a clear attempt to nullify the action of two judicial officers in approving defendant's bonds, by immediately declaring them insufficient on the same state of facts on which these very judicial officers had just acted. Unless some change in the *status* of the sureties or principal was shown, the commissioners' court had no jurisdiction to declare the bonds insufficient. The "common law and every system of law recognizes the fact that it is a *positive wrong* to exclude a rightful claimant from an office." 24 Michigan, 458.

The office of probate judge is a constitutional office, owing its origin and being to the Constitution. No other fair construction is admissible from the language of the fundamental law. *State ex rel. v. Gardner*, 43 Ala. 234. If it be said the giving of bond is ministerial, and that the office is vacated for failure to give it, it is sufficient to say that the *judge* cannot be removed in this proceeding for failure to perform a ministerial duty. Otherwise all the judges could be legislated out of office by simply annexing ministerial duties on such terms that they could not perform them. This is indirectly doing what the Constitution itself forbids. A commission must be founded on a certificate of vacancy or election, which in legal contemplation is part of the commission. Any facts showing want of jurisdiction to make the certificate are admissible, whether the commission be *prima facie* evidence or not.

STONE & CLOPTON, GRAHAM & ARRINGTON, and WATTS & WATTS, *contra*. — The circuit judge acted judicially in refusing to approve Thompson's bond. *Ex parte Harris*, at last term. His action could not be collaterally impeached by showing in this proceeding that the bond tendered was sufficient. The commission of the governor is conclusive evidence, until invalidated on *quo warranto*, 'as to who is the lawful officer. *Hill v. State*, 2 Ala. 559; *Reynolds v. McWilliams*, 49 Ala. 552; *Ex parte Harris*, in MS. The circuit judge was bound to take notice that the petitioner was the rightful officer. 28 Ala. 164; 37 Ala. 32; 1 Ala. 559.

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The Constitution does not itself create the office of probate judge; but it is left entirely to the legislative discretion to say whether the courts of probate, which the Constitution authorizes, shall or shall not exist. The probate judge is on the same footing with the officers of the "other inferior courts" which may be from time to time established. These "inferior courts," and the judges thereof, may be destroyed by the power which creates them. *Perkins v. Corbin*, 45 Ala. Having the right to create the office, what prevents the legislature from prescribing the terms on which the office shall be held? *Dorman v. State*, 34 Ala. 229; *Benford v. Hill*, 15 Ala. 521.

The constitutional provision about the removal of judges is not the only mode by which the office is vacated. The maxim "*Expressio unius est exclusio alterius*" ought not to countervail the admitted right and power of the legislature to do everything for the public weal not directly, or by strong implication, forbidden by the Constitution. *Sadler v. Langham*, 34 Ala. 311.

Ever since the State has been admitted into the Union, it has had statutes providing for the vacation of judicial offices and the causes of removal. Until *Gardner's case* it was never doubted, whether the office was created by the Constitution or owed its origin to statute, that the legislature had plenary jurisdiction to prescribe the terms and conditions on which the office should be held, and in what manner forfeitures should be enforced. *Gardner's case* is in irreconcilable conflict with the later case of *Perkins v. Corbins*.

The peace and good order of society require that there should be some power to fill vacancies. Can an officer abandon his duties for months, when the impeaching body is not in session, and afterwards come back and be entitled to hold the office, notwithstanding the appointment of another to fill it, until the court of impeachment acts? Suppose the judge is sentenced to the penitentiary for crime; is the governor powerless to fill the office — although the judge is in the penitentiary — until the legislature meets and impeaches the judge? All these consequences must flow from the position contended for by appellant. The provisions of the Constitution about the right of the judge to "hold office for six years," &c., must all be construed in harmony with the construction which, for half a century, has been adopted by all the departments of the government under the different state constitutions.

NOTE BY REPORTER. — The motion to dismiss the appeal was overruled, for the reasons given in the following opinion: —

BRICKELL, C. J. — This was a proceeding instituted by the appellee, claiming to be judge of probate of the county of

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Macon, against the appellant as the former incumbent of the office, under the 6th article, 5th title, chapter 1, part 1, of the Revised Code, to compel the delivery of the books, papers, and property appertaining to the office. It was had before the judge of the circuit court of the ninth judicial circuit, who made an order requiring the appellee to make the delivery. From that order this appeal is prosecuted, and the appellee moves its dismissal, because the appeal does not lie from such orders, but only from the final judgments of the circuit court.

The jurisdiction conferred by the statute under which the proceedings were had and the order rendered is special, and to be exercised not by a court in term time, but by the judge of the circuit court, or of the probate court of the county, in which the person complained of resides. As the judge of the one or the other court, he is clothed with authority to entertain the complaint, when properly made, and to hear and determine it in the mode prescribed by the statute. The remedy to be pursued for a revision of the proceedings is not prescribed. *Certiorari* would, in the absence of a statute authorizing an appeal, be the only remedy to revise the action had under the statute. 1 Brick. Dig. 333, § 2.

At common law, *mandamus* was the remedy to compel the transfer or delivery of the books, records, papers, seals, and other paraphernalia of a public office to the person entitled to their custody; and by virtue of the writ the surrender of public buildings pertaining to the office could be compelled. High on Ex. Leg. Rem. part 1, chap. 2. The purpose of the Code was to provide even a more summary and adequate remedy than that *mandamus* would afford. The remedy thus provided is cumulative, not exclusive, and is of like nature with *mandamus*.

The act of December 15, 1868 (Pamph. Acts 1868, p. 410), authorizes an appeal to this court from the judgment of judges of the circuit and city courts, "on applications for writs of *certiorari*, *supersedeas*, *quo warranto*, *mandamus*, and other remedial writs." Circuit judges, as judges, have authority, which can be exercised in vacation, distinct from and independent of the jurisdiction of the circuit court, to grant writs of *certiorari*, *supersedeas*, *quo warranto*, *mandamus*, and all other remedial and original writs, which are grantable by judges at the common law. R. C. § 747. A like authority is generally conferred on the judges of city courts, by the statutes creating such courts, and is necessary to render the jurisdiction of the courts effectual. The purpose of this statute was to make the right of appeal coextensive with the authority the judges, as such, could exercise, as it is coextensive with every final judgment the circuit or city court may render. The pro-

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ceeding before the judge to compel the delivery of official books and papers is remedial; the order he may issue is a mandatory precept, compulsory on the defendant to whom it is addressed. It is of like nature with *mandamus*, accomplishes the same result, and is embraced within the general phrase of the statute of 1868, "other remedial writs." The appeal is properly taken under that statute, and the motion to dismiss must be overruled.

At a subsequent day of the term, the case having been duly argued and submitted, the Chief Justice delivered the opinion of the court on the merits of the case.

BRICKELL, C. J.—It is the duty of every public officer, on the expiration of his official relation, to surrender to his successor the property of the office which the law commits to his custody. In such property he has no individual right or interest; the title to it resides in the public, and of it he is merely custodian during his continuance in office. The duty is ministerial merely, no matter on what officer it devolves; and at common law, its performance was enforced by *mandamus*. High on Ex. Leg. Rem. §§ 73–4. The general assembly deeming the common law remedy too dilatory, and impressed with a conviction of the importance of avoiding the public injury which would ensue from protracted litigation between the outgoing and incoming officer over the property of the office, provided a summary remedy for compelling the delivery of books, papers, property, and money, by public officers to their successors. It is first declared that in all cases, in which it is not otherwise expressly provided, when any office is vacated, except by the death of the incumbent, all books, papers, property, and money, belonging or appertaining to such office, must, on demand, be delivered over to the qualified successor; a violation of the duty is a misdemeanor. On a refusal, after demand, to make the delivery, complaint may be made to the judge of probate of the county, or the judge of the circuit court, by the successor in office, and if the judge is satisfied by the oath of the complainant, and such other evidence as may be offered, that property pertaining to the office is withheld, he must make an order requiring the person withholding to show cause why he should not be compelled to deliver it. The person charged may discharge himself by making affidavit that he has made the delivery. If he does not make the affidavit, the judge must proceed to inquire into the circumstances, and if it appears that such property is withheld, must make an order committing the accused to jail until he makes the delivery, or is otherwise discharged by due course

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of law. A search-warrant must also issue, commanding a search to be made in designated places for the property withheld, and if it is found, it must be seized and brought before the judge. R. C. §§ 193-197. The proceeding is summary, and designed to afford an expeditious remedy for the correction of the wrong against which it is directed. It is not conducted, and should not be, as ordinary adversary suits between private individuals. The complaint serves its purpose when it calls into exercise the authority conferred on the judge. It is not necessarily the basis of the action taken. That may be founded on other evidence, oral or written, which may be offered to and received by the judge. If the oath of the complainant and such other evidence as the judge may receive requires an order to the party charged to show cause, the order is made. On his appearance, the statute does not contemplate that he shall plead, or that the judge shall be arrested or impeded in the discharge of his duty by matters of pleading. If the party charged does not discharge himself by an affidavit that he has delivered the property it is alleged he is guilty of withholding, the duty of the judge is plain and must be pursued. An inquiry into the circumstances must be made, and on the inquiry, all relevant evidence can be introduced by complainant and defendant, and the judgment which the evidence requires pronounced. No pleading is necessary to authorize the introduction of all proper evidence; and if pleading is resorted to, it cannot narrow or enlarge the inquiry the judge is bound to make. The judge very properly overruled the motions to quash and the demurrer to the complaint. They were mere nullities, and should not have embarrassed him in proceeding to the examination the statute prescribes.

2. It is insisted a probate judge is not an officer against whom this statutory remedy can be taken. Under our statutes a probate judge is not only a judicial but a ministerial officer. The court over which he presides is a court of record. Of the records, he is the exclusive legal custodian. All the duties ordinarily devolved on the clerk of a court of record he is required to perform. All the transactions of the court he must, in his ministerial capacity, register. Besides, he has charge of all the records of the county, as a municipal division of the State, and registers every conveyance of property, real or personal, within the county, of which registration is authorized. Having a judicial and ministerial capacity, that which it is his duty as a ministerial officer to do could, at common law, be compelled by *mandamus*. It is in his ministerial capacity that he has the custody of the records, papers, and other property of the office. From that capacity results the duty of delivering them to his qualified successor. If he fails or neglects the

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duty, he may, as any other mere ministerial officer, be compelled to its performance. The rule in reference to awarding a *mandamus*, at common law, is, that "it is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety of issuing a *mandamus* is to be determined." If mere ministerial duties are devolved on an officer, judicial or executive, he may be compelled to their performance. *Tenn. & Coosa R. R. Co. v. Moore*, 36 Ala. 371; *Nichols v. Comptroller*, 4 Stew. & Port. 151. The statutory proceeding to compel the transfer of books, papers, and other property of a public office, is merely cumulative, and will lie whenever a *mandamus* could be obtained at common law. If there was a clerk of the court of probate, charged with the custody of its records and other property, and bound to the performance of the ministerial duties the judge is required to perform, it would not, we suppose, be doubted that he was amenable to the statutory remedy. The judge, in his ministerial relation, being bound to the duty the statute proposes to enforce, is subject to the remedy it prescribes.

3. A *mandamus* to compel the delivery of property pertaining to a public office could not be invoked, when in reality the object was to test the title to the office. If the title was the real question in issue, the courts would not interfere by *mandamus*, but remitted the parties to *quo warranto*, or other appropriate legal remedy. High on Ex. Leg. Rem. § 77. The relator must have exhibited a clear *prima facie* title, entitling him to the custody of the property of the office, or the courts would not compel its transfer to him. The same rule must prevail in reference to the statutory proceeding. It cannot be perverted into a method of determining the strength of rival claims to a public office. The complainant resorting to it must show a *prima facie* title to the office, free from all reasonable doubt, — a title, to which the law attaches the possession of the property of the office, and the right to exercise the functions of the office, until, in a direct judicial proceeding, that title has been vacated. *In re Whiting*, 2 Barb. 513; *People v. Allen*, 42 Barb. 203; *People v. Stevens*, 5 Hill, 616; *In re Backer*, 11 How. Pr. 430. A *prima facie* title to a public office confers a right to exercise its functions, and a right to the possession of the insignia and property thereof. On this *prima facie* title the court will compel a delivery of the insignia and property, that the functions and duties of the office may be exercised. *Atherton v. Sherwood*, 15 Minn. 221; *Crowell v. Lambert*, 10 Minn. 369; *People v. Head*, 25 Ill. 325; *Bloom v. Van Rensselaer*, 15 Ill. 503; High on Ex. Leg. Rem. § 74. We turn then to the inquiry, has the relator exhibited a clear *prima facie* title to the office of judge of probate of Macon county?

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The facts in reference to it are undisputed. The respondent Thompson was constitutionally elected judge of probate, at the last general election, for the term of six years. Before entering on the duties of the office, he gave bond payable and conditioned, approved and filed as required by law. Having taken the oath of office, and received from the governor a commission, he entered into the office. At the time of his election and qualification, the law annexed as a condition precedent to his induction into office the making and approval of a bond conditioned for the performance of his official duties. R. C. § 784. As a condition to continuance in office, the law also required him to give an additional bond, whenever a majority of the grand jury of the county should, in term time, require it, on address to the presiding judge of the circuit court; or, in vacation, three members of the commissioners' court of the county should, on address to the judge of the circuit court, require it. R. C. § 174. The failure to execute such additional bond is a forfeiture or vacation of the office, and on the circuit judge is imposed the duty of certifying the vacancy to the governor, who has the appointing power and is bound to fill it. R. C. § 177. These are conditions imposed by law, when the respondent was elected and accepted the office: the one a condition precedent, which must have been performed before he could legally be inducted into the office; the other a condition on which continuance in office depended. "If conditions in law, which are annexed to offices, be not observed and fulfilled, the office is lost forever, for these conditions are as strong and binding as express conditions." 7 Bac. Ab. 321.

Four members of the commissioners' court, in vacation, by address to the judge of the circuit court of the ninth judicial circuit, of which Macon county is a part, complained that the official bond of the respondent, as judge of probate, was insufficient. Thereupon he was required to give an additional bond. The requisition was in writing, and of it the respondent had personal notice. He appeared and tendered an additional bond, but the circuit judge not deeming the securities thereon sufficient declined to approve it. After some delays to enable the respondent to improve the bond, so that the judge could approve it, he failed to give a satisfactory bond, and by the express terms of the statute the failure operated a vacation of the office, and the unqualified duty of the judge was to certify the vacancy to the governor. The certificate was made, and the governor appointed and commissioned the complainant to fill the vacancy, who was qualified according to law. The judge of the circuit court in requiring an additional bond, and in approving or disapproving such bond when tendered, and in certifying a vacancy in the office on a failure to

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give an additional bond, exercised power in its nature judicial. *Ex parte Harris, Ex parte Thompson*, January term, 1875. His action until reversed or annulled is final and conclusive. When it is drawn in question collaterally, the facts on which it is based cannot be again litigated or controverted. It follows, therefore, that the judge of the circuit court properly refused to hear any evidence touching the sufficiency of the bond, which the respondent had tendered to him before the certificate of the vacancy, and which he had declined to approve. That bond had been finally and conclusively adjudicated insufficient, when its sufficiency was directly before the judge, and he had exclusive jurisdiction to determine the matter. On this proceeding that adjudication could not be reopened.

When a vacancy occurs in the office of judge of probate subsequent to an election, on the governor rests the duty of filling it. The evidence of the appointment is a commission signed by him, under the great seal of the State, countersigned by the secretary of state. Public offices are public trusts created for the due and orderly administration of the law, the preservation of public peace, the convenience and advantage of the citizen, and the protection of individual right and interest. Public policy demands that they shall at all times be filled by officers bearing the proper evidence of their right and authority, and without doubt amenable for misfeasance, malfeasance, and nonfeasance. No uncertainty or doubt should rest in the public mind as to who is a legal public officer. It would be an evil of less magnitude if the sphere of official duty and the extent of official authority was indistinctly marked, than that the community at large should be fretted with doubt and uncertainty as to the individual from whom they could invoke the exercise of official authority, and demand the performance of official duty. Hence under our Constitution and statutes, nearly every public officer must bear a commission from the governor. Public offices are elective, and the returns of elections are made to the secretary of state, on whose certificate the commission originally issues. When subsequent to an election a vacancy occurs otherwise than by resignation, some public officer, ministerial or judicial, acting under the sanction of official oath, is charged with the duty of ascertaining and certifying the fact of vacancy to the governor. On this certificate an appointment is made, when it discloses the office is vacant. The commission of the governor, whether granted on a certificate of election, or a certificate of vacancy, is the highest and best evidence of who is the officer, until on *quo warranto*, or a proceeding in the nature of *quo warranto*, it is annulled by a judicial determination. *Hill v. State*, 1 Ala. 559; *Brightly's Lead. Election Cases*, 314, and

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note on p. 319. It is this commission which imparts to the courts judicial notice, and which informs the community who are clothed with official authority, and bound to official duty. In a proceeding, whether by *mandamus* or under the statute, to compel the transfer of property attached to a public office, this commission is a clear *prima facie* title to the office, on which the courts will proceed without indulging any inquiries behind it, when it is founded on a certificate of election, or a certificate disclosing vacancy, made by proper authority. Inquiries behind it would generate a controversy as to the title to the office, which, as we have already said, cannot be entertained either on an application for a *mandamus* or in the statutory proceeding. The court must rest on the *prima facie* title, and award the keeping of the property of the office to this title, for the time being, without adjudicating whether the relator has or not the actual title. *People v. Kilduff, supra*; *People v. Head, supra*; *Crowell v. Lambert, supra*; *Atherton v. Sherwood, supra*; *State v. Churchill*, 15 Minn. 455; *People v. Miller*, 16 Mich. 56; *State v. Governor*, 1 Dutch. N. J. 331. The relator having been duly commissioned by the governor, and having qualified as judge of probate, was entitled to the custody of the books, papers, moneys, and property of the office. The refusal of the respondent to deliver them on demand subjected him to an order of commitment, as made by the circuit judge.

4. It is insisted by the appellant, that a probate judge is not now within the terms of the statute authorizing the requisition of an additional official bond, on the address of a grand jury or of the commissioners' court; that the statute only applies to officers whose official bonds are *required to be approved by a circuit judge*; and as the bond of a probate judge may now be approved by a chancellor, judge of the supreme court or of the circuit court, he is not within its terms. When the statute was originally enacted, a circuit judge only had authority to approve the bond of a judge of probate. In 1862, authority to approve was conferred on a chancellor, or a judge of the supreme court, concurrent with that of the judge of the circuit court. R. C. § 784. Conferring such authority on a chancellor, or judge of supreme court, certainly was never intended to absolve the probate judge from the duty of keeping a sufficient official bond, or to relieve the grand jury and commissioners' court of the county from the duty of inquiring into its sufficiency, and requiring a bond that will fully indemnify and protect the community. There does not seem to us the least repugnance between the statutes. The purpose is, that a probate judge, clerk of the circuit court, or other public officer, whose official bond a judge of the circuit court has authority to approve, may by the judge, in certain contingen-

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cies, be required to give an additional bond. The statute cannot be read as if it was confined to officers whose bonds a circuit judge alone had authority to approve. It must be understood as referring to all official bonds he has authority to approve, though a like authority is conferred on other officers.

5. It is next insisted, the statutes vacating the office of the judge, on his failure to execute an additional official bond on requisition, are violative of the Constitution. The proposition is thus expressed in the written argument of the counsel for appellant: "The office of probate judge is elective. Its term is fixed by the Constitution of the State, in section 12 of Article VI. The entire subject of removal of such judge, after his election, commission, qualification, and induction, is exclusively committed to the general assembly, and to the general assembly and governor, in specific modes affirmatively prescribed in the Constitution in sections 23 and 24 of Article IV. and in section 12 of Article VI. Except in one or the other of these modes, the respondent cannot be removed, either directly or indirectly. No circuit judge can remove him upon any address, or lay the predicate of his removal by any requisition founded on any address." In support of the proposition we are referred to numerous authorities, most of which are collected in Cooley's Con. Lim. 276-77 (note 2), asserting that when the term of an office is fixed by the Constitution, the legislature cannot remove the officer — except as the instrument may allow — either directly or indirectly by abolishing the office. An error in the proposition lies in assuming the office of probate judge is created by the Constitution. The Constitution does not create the office. It exists and its character is defined by statute. The Constitution was adopted, and it must be construed in connection with existing laws. These were not abrogated, except so far as repugnant to the provisions of the Constitution. When the Constitution was adopted the court of probate existed, — clothed by statute with the jurisdiction which the former constitutions and the present Constitution declare the general assembly should have power to delegate to a court of probate in each county, and a much larger jurisdiction wholly of legislative origin. The only officer of the court was by statute designated a judge, but he was intrusted with ministerial as well as judicial powers. A bond was, by legislation, demanded from him, as a guaranty for diligence and fidelity in the performance of his ministerial duties, as it is exacted from other mere ministerial officers. It is not a guaranty for his integrity and fidelity as a judge. For this no other security is demanded from him than that demanded from all other judicial officers — his official oath, and the sense of responsibility which the power and dignity of the

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office inspire. The official bond stands as an indemnity against his errors or his wilful misconduct, as a ministerial officer only. *Hamilton v. Williams*, 26 Ala. 527; *Phelps v. Sill*, 1 Day, 315. For that which he may do or omit as a judge, he is exempt from a civil suit or indictment. The policy of the State, founded on a due regard for the interests of the community, expressed in legislation which began in the days of our territorial existence, and which has been enlarged as public necessity demanded, has required of a probate judge an official bond, with sufficient sureties, conditioned in legal effect for the faithful performance of his ministerial duties, as a condition precedent to his induction into the office; and the giving an additional bond, when legally required, as a condition on which his continuance in office depended. The failure to give such bond is at first a failure, in legal contemplation, to accept the office; and a failure to give the additional bond, when required, is a voluntary refusal to perform the condition on which his continuance in office depends, and is an abandonment by his own act, or a vacation of the office. The court of probate thus organized, and the judge of probate having a dual capacity, ministerial and judicial, is the court of probate and the judge of probate referred to in the Constitution. It may be that for judicial misconduct the judge cannot be removed from office except in the modes prescribed by the Constitution for the removal of judicial officers. Removal is involuntary — not the act of the officer, but of a superior power. The failure to give an additional bond is the act of the judge himself — is voluntary; and the public good demands the vacation of the office, unless the bond is given for the security of the public. We cannot see that the Constitution is offended by the statutes under which an additional bond may be required of a probate judge. The argument would be stronger to support the proposition, that an additional bond could not be required of a sheriff, whose constitutional term is three years, and his failure to execute it made a vacation of the office. Yet, such a proposition would scarcely be advanced, and would be at variance with all our legislation from its earliest history.

There is no error in the record, and the judgment must be affirmed.

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Trespass.

1. *Joint tortfeasors ; how may be sued.* — Joint *tortfeasors* may be sued jointly or severally for a trespass, and if the *tort* be of such a nature as to authorize it, the injured party may bring trover against one, trespass against another, and detainue against a third, if his possession was obtained by the aid of the *tortious* acts of the others.

2. *Same ; judgment against one, when no bar to suit against others.* — Judgment against one or more joint trespassers in either of these actions is no bar to a recovery against the others. Nothing short of a release, satisfaction, or something which the law deems equivalent to it, can operate a bar.

3. *Same.* — Where the injured party waives the *tort* and brings an action *ex contractu*, he estops himself from pursuing either of the trespassers for the *tort* ; but an action of detainue does not have that effect, for the reason that it is not an admission that the property sued for was not *tortiously* taken from the plaintiff, but rather implies the contrary.

4. *Pleadings, rulings on ; presumptions as to.* — Where the record shows that the defendant pleaded the general issue "with leave to give in evidence any matter that might be specially pleaded," and also a special plea in bar, and it appears that the overruling of a demurrer to the special plea was on a day subsequent to the overruling of a demurrer (the grounds of which are not disclosed) to the plea of the general issue, &c., a recital in the minute-entry, "the plaintiff having declined to plead further, on leave being given," &c., will be construed to mean that the plaintiff's declining to plead over related only to the special plea. In such a case judgment should not be rendered in favor of the defendant, but the plaintiff should be required to proceed upon the issue made in the plea of the general issue.

APPEAL from Circuit Court of Sumter.

The record does not give the name of the presiding judge.

Appellant, Louisa Du Bose, brought trespass against appellee, Marx, for causing the sheriff, to whom appellee, plaintiff in execution, executed an indemnifying bond, to levy upon and sell, under execution issued in a judgment against a third person, a horse belonging to appellant.

The appellee, defendant in the court below, pleaded two pleas: First, the general issue, in short by consent, with leave to give in evidence any matter which might be specially pleaded. Secondly, a special plea setting forth that the sheriff had sold the horse under the execution, after being indemnified by defendant as set forth in the complaint ; that the horse was regularly purchased at the sale by one Bruce, who afterwards held and claimed it under this purchase alone ; that plaintiff instituted detainue against Bruce for the horse, revived it against his administrator upon his death, and recovered judgment in said suit for the horse, the value and damages for its detention, &c., being assessed by the jury ; that thereupon plaintiff caused a writ of execution to be issued and delivered to the sheriff, and that in said action of detainue the title to the horse, by virtue of the levy and sale to Bruce, was in issue and passed on by the jury in making up their verdict ; wherefore plaintiff had waived the trespass, &c. The plaintiff demurred to the second

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plea, assigning as grounds of demurrer : 1st. That it failed to allege that plaintiff had received satisfaction of her judgment against Bruce's administrator. 2d. "Because the complaint in her suit shows that defendant Marx, by his bond of indemnity, was a co-trespasser with the sheriff in unlawfully seizing and selling the plaintiff's horse."

A minute-entry of November 12, 1873, recites that "the demurrer of plaintiff to defendant's first plea having been argued and heard, it is considered and ordered by the court that said demurrer be and the same is hereby overruled."

A minute-entry of the next day recites that the parties "came by their attorneys respectively again, and the defendant pleads the former action of detinue in his second plea, to which the plaintiff demurs ; and the said demurrer of plaintiff to said second plea being argued and heard, it is therefore considered and ordered by the court that said demurrer be, and the same is hereby overruled ; and the plaintiff having declined to plead further, on leave being given, it is therefore considered that the defendant go hence and be discharged, and recover his costs of said plaintiff, for which execution may issue."

It is now assigned as error that the court erred in each of its rulings on the demurrers and in the judgment rendered.

WATTS & WATTS for appellant. — "A cause of action once vested cannot be destroyed except by a release under seal, or by something given in satisfaction of the wrong." *Spivey v. Morris*, 18 Ala. 256. A judgment merely, with execution but without satisfaction, will not defeat another action. By giving the indemnifying bond the defendant became a co-trespasser with the sheriff in making the levy and sale. *Lovejoy v. Murray*, 3 Wall. 1 ; 48 Ala. 628

The cases in which it is held that by suing one trespasser the plaintiff makes an election preventing suit against the others concerned in the trespass, is where the plaintiff pursues inconsistent remedies ; action *ex contractu* against one, and seeks afterwards to bring an action *ex delicto* against others. Trespass, trover, and detinue are not inconsistent remedies. *Leavitt v. Smith*, 7 Ala. 183 ; *Drake v. Mitchell*, 3 East, 250 ; *Bowman v. Teal*, 23 Wendell, 309 ; 40 Ala. 670. The court having erred, injury is presumed from the ruling on demurrer. Why should plaintiff go through the farce of a trial when the court had already stated that defendant's plea was a good defence ? Can this court presume that plaintiff had or could have had the benefit of everything under the plea of the general issue, when the court had already held that under the general issue or elsewhere the facts pleaded constituted a defence ? Construing the language of the judgment-entry as the court

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may, there is no reasonable construction of it which removes the presumption of injury. *Eads v. Murphy*, *post*, 520. No formal issue is necessary on the plea of the general issue. Issue was made up on that plea without "pleading over." Is it not the proper construction of this entry to hold that it related to the pleading further on the second plea?

W. E. and R. H. CLARKE, *contra*. — The judgment-entry does not recite the grounds of demurrer to the first plea; it must, therefore, be presumed that it was properly overruled. If the form was objected to, demurrer was not the way to reach the defect. 39 Ala. 489; 15 Ala. 743. The first plea distinctly controverted the allegation that Marx had committed the acts complained of; the reservation of the right to give in evidence special matters of defence did not estop defendant from relying on "not guilty" alone. Appellant, when she refused to plead over, on leave being given, established the truth of the plea as conclusively as the verdict of the jury would have done. 27 Ala. 228. *Eads v. Murphy*, *post*, 520, does not militate against this judgment. If the second plea was bad, appellant was not injured by overruling her demurrer, since by refusing, on leave given, to plead over, she admitted of record that defendant had not committed the acts complained of. The good plea demurred to went to the whole action, and plaintiff's refusal to plead further was tantamount to an admission of record that under no state of facts could she recover. 26 Ala. 47. The first plea, however, is more than the general issue; it includes all issues that can be formed, except where the plea must be sworn to. *Hays v. Myrick*, 47 Ala. 335. The plaintiff refusing to plead, or progress further with her suit, judgment was properly rendered against her. 27 Ala. 288; *Ib.* 44. The suit against Bruce's administrator was a bar to this suit. 20 Ala. 320; 13 Michigan, 77; 1 Johns. 290. The two actions brought by plaintiff were inconsistent. *White v. Martin*, 1 Port. 220; *Hite v. Long*, 6 Randolph (Va.), 457; *Sangster v. Commonwealth*, 17 Va. 124.

MANNING, J. — Appellee having a judgment against Kimbrough C. Du Bose, caused an execution thereupon to be levied on a horse belonging to appellant, and the horse to be sold to satisfy it, — appellee having executed to the sheriff a bond to indemnify him against loss for making the seizure and sale. One Bruce became the purchaser of the horse, and was sued in detinue for him by appellant, in which action she obtained verdict and judgment against Bruce's administrator, after his death, for the horse, or his value, in the alternative, and for damages for the detention, — but not satisfaction

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thereof. Appellant then sued appellee in this action, for his trespass in causing her horse to be seized and sold by the sheriff.

Marx, the defendant in this action, pleaded first, "in short, by consent, the general issue, with leave to give in evidence any and all matters in defence which he could do if the same were specially pleaded" (a mode of pleading often very embarrassing to plaintiffs and to the courts); and secondly, a special plea in bar setting forth that he did execute to the sheriff such indemnifying bond; that by reason thereof and by virtue of his execution against said Kimbrough C. Du Bose, the horse aforesaid was sold, and Bruce became purchaser thereof; that an action of detinue was brought by plaintiff against Bruce for the horse, and judgment was therein obtained after his death against his administrator for said horse, or his alternative value, and for damages for the detention, besides costs of suit, — upon which judgment the plaintiff therein caused a writ of execution to be issued and delivered to the sheriff; and that in said action of detinue the title to said horse, by virtue of the levy and sale to Bruce, was in issue, and was passed on by the jury in making up their verdict, whereby, he averred, plaintiff had waived the trespass, and was barred and precluded from maintaining this action against him.

The record shows a minute-entry reciting the overruling of a demurrer to the first plea, and contains a demurrer to the second plea, on the ground: 1st, that the plea did not aver satisfaction of the judgment against Bruce; and 2d, that the complaint showed that defendant (appellee) was a co-trespasser with the sheriff. In this, we presume, there was a mistake, and that as the demurrer was to the plea, the pleader meant to say that it (the plea) showed that defendant was a co-trespasser with the sheriff.

Joint trespassers are liable to be sued jointly or severally for damages for their trespass; and a recovery against one without satisfaction of the judgment is no bar to a recovery against the other, — any more than a judgment without satisfaction, against one or more signers of a joint and several bond or promissory note, is a discharge of the others. *Lovejoy v. Murray*, 3 Wal. 1; *Blann v. Crocheron*, 19 Ala. 647; *Same v. Same*, 20 Ib. 320.

After an injury has been committed, the cause of action is not discharged by any act short of a release, or acceptance of something in satisfaction. *Bowman v. Teal*, 23 Wend. 306; *Baylis v. Usher*, 4 Moore & Pa. 790.

And "a judgment recovered in any form of action is still but a security for the one general cause of action, until it is

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made productive in satisfaction to the party; and until then, it will not operate to change any other collateral concurrent remedy which the party may have. *Drake v. Mitchell*, 3 East, 251.

The same *tortious* act may be of such a nature as to enable the party against whom it is committed to sue the *tortfeasors*, in either trespass, trover, or detinue, those being all actions *ex delicto*.

And since, as we have seen, joint *tortfeasors* may be sued severally, and the injured party has a right to bring against them severally either one of these three actions, and can be barred of this right only by a release, or the acceptance of something in satisfaction; he may bring trespass against one, trover against another, and detinue against a third of the *tortfeasors*, if the third have possession of the chattels sued for, obtained with the aid of the tortious acts of the other two. Of course, however, if full recovery be had in each suit, the plaintiff would not be entitled to satisfaction from all. Upon a total or partial satisfaction of one of the judgments, the defendants in the others would be entitled, on *audita querela*, to have the judgments against them credited *pro tanto*. *Lovejoy v. Murray*, *supra*.

There are cases in which the tort may be waived, and instead of the action *ex delicto*, one *ex contractu*, assumpsit, may be brought. In such a case, the party cannot afterwards bring an action *ex delicto* upon the same matter for a tort. For by action *ex contractu* he affirms that the party acquired the thing which is the subject of the suit, by contract with him, and after having so asserted in the courts, and thereupon being allowed to recover, he will not be permitted to pursue as a *tortfeasor* any other person concerned in the transaction.

The law does not tolerate this incongruity. *Fireman's Ins. Co. v. Cochran*, 27 Ala. 228; *Tankersley v. Childers*, 23 Ib. 781; *Vandyke v. The State*, 24 Ib. 81.

But an action of detinue does not admit that the property sued for was not tortiously taken from plaintiff. It rather implies the contrary. Consistently with it, trespass or trover may be brought against another party to the transaction, as one participating in the *delictum*, by which plaintiff's property had been taken and was withheld from him.

Bruce, however, the purchaser at the sheriff's sale, was not liable to be sued in trespass at all. He did not interfere with plaintiff's possession of the horse, and was not a co-trespasser with the appellee, Marx, and the sheriff. And it may be doubted whether a recovery and satisfaction from him would be full compensation for the trespass committed by Marx and the

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sheriff, especially if this were accompanied by acts and circumstances maliciously injurious.

Certainly the action of detainee against Bruce, and the recovery of judgment therein, and issue of writ of execution, without satisfaction, constituted no defence to the suit in this cause against Marx, the appellee; and the demurrer to his plea, setting forth those facts as a bar to the suit, should have been sustained.

It is insisted that the error in overruling the demurrer to the second plea should not effect a reversal of the judgment; for, that the defendant Marx, besides that plea, had pleaded the general issue, to which also plaintiff had demurred, and her demurrer had been overruled; and that therefore, when she refused on leave given to plead over, judgment was correctly rendered against her.

The record does not contain any demurrer of plaintiff to the first plea referred to; which is, that defendant "pleads in short, by consent, the general issue, with leave to give in evidence any and all matters in defence which he could do if the same were specially pleaded." But there is a recital in the record that "the demurrer of plaintiff to defendant's first plea being argued and heard, . . . the same is hereby overruled."

What was this demurrer? There is nothing in the record to show. If there was one, it should have been in writing. The Revised Code, § 2656, declares: "No demurrer in pleading can be *allowed* but to matter of substance which the party demurring specifies; and no objection can be taken or allowed which is not distinctly stated in the demurrer." And the cases referred to by counsel for the appellee show that the court is strict in regarding what is commonly called a general demurrer, one that specifies no objection to the pleading, as a mere nullity, which it, therefore, overrules or disallows. Such a paper might be disregarded by the court, or taken from the files by its order, though usually it is overruled. And since the record does not contain anything purporting to be a demurrer to the first plea, or show that there was any paper of that nature in which an objection was specified to the plea, we are justified in supposing that there was no valid demurrer at all.

If we suppose, on the other hand, that there was a demurrer which specified objections to the plea, we ought to presume that they excepted to defendant's claim of "leave to give in evidence [under the general issue] any and all matters in defence which he could do if the same were specially pleaded." There is nothing else in the plea to which objection could reasonably be taken, and if that was the ground of demurrer, then the court erred in overruling it; for although a motion might, perhaps, have been made to strike out that portion of

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the plea, we see no reason why the exception, to it might not also be made by demurrer. See *Barron v. Vandvert*, 13 Ala. 237.

However this may be, we are of opinion, on examining the record, that the declining to plead over related to the second plea only, after the court had, by overruling the demurrer to it, erroneously held that plea to be good,—the declining to reply being induced by this action of the court and referring to the same matter.

No replication was necessary to the general issue, which itself “puts in issue all the material allegations of the complaint.” Revised Code, § 2639. The averments made in the complaint on one side, and the denial of them by the general issue on the other, constitutes an issue without more. It is only in cases in which defendants “briefly plead specially the matter of defence” (as the Code of 1852 required them to do in all except a few specified actions), that the general replication, “the plaintiff joins issue on said plea,” is prescribed as the proper form of making an issue, when it is not intended to reply specially.

The demurrer to the second plea was considered and overruled on a day subsequent to that on which the entry in regard to the first plea was made. And it was error in the court, on overruling that demurrer, and upon “plaintiff having declined to further plead, on leave being given,” to order “that the said defendant go hence and be discharged, and recover of plaintiff his costs of suit.”

The plaintiff should have had leave to proceed upon the issue made by the first plea, unless the court, which had just held that the second plea set forth a good defence, intended also to hold, as we suppose it must have held, that the matter of that plea was a good defence under the first plea, “as if the same were specially pleaded,” which would itself have been error.

There is no view of this cause which enables us to perceive that the error of the circuit court could not have produced any injury ; and its judgment is therefore reversed, and the cause remanded.

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[Ramsey v. Strobach.]

Ramsey v. Strobach.*Action on Account, &c.*

1. *Dismissal of suit for recovery below jurisdiction: when not proper.* — Judgment should not be set aside and the suit dismissed from the circuit court, because of a recovery for an amount below its jurisdiction, when suit was brought for a sum within the jurisdiction, and the plaintiff makes affidavit that the sum sued for is actually due, and that the recovery of the true amount was prevented by any of the specific causes mentioned in section 2708 of the Revised Code.

2. *Deputy sheriff; authority of, to bind principal.* — The full or regular deputy sheriff is a general agent for the sheriff, and may be presumed to have authority to contract for, and charge his principal with, the expense of feeding and keeping live stock upon which the deputy has levied. Instructions limiting the authority of the deputy in this respect will not affect persons dealing with him, unless brought to their notice.

APPEAL from City Court of Montgomery.

Tried before Hon. JOHN D. CUNNINGHAM.

The appellee, Strobach, was sheriff of Montgomery county. An attachment against the estate of one B. W. Ramsey having been placed in his hands, he delivered it to one J. A. Boothe, his regular deputy, to execute. Boothe levied on fourteen mules and some other property on the plantation of said B. W. Ramsey, and made the plaintiff, R. E. Ramsey, his bailee, and as such he took care of the mules and fed them for some time, and also took charge of the other property. The testimony was conflicting as to what, if any, promise Boothe made about paying appellant, R. E. Ramsey, for his services. There was some testimony tending to show that as R. E. Ramsey was then in possession of the plantation, as superintendent, it was expected that the use of the mules would be considered a sufficient equivalent for taking care of them. The plaintiff, however, testified that Boothe promised to pay him for his services. Strobach and Boothe both testified that Strobach's instruction to Boothe were to leave mules on plantations only where the party with whom they were left would not charge for keeping them, and in event this could not be done, to bring them to Strobach's lot, and that this was the only authority Boothe had. The plaintiff, appellant, brought suit in the circuit court against appellee, to recover the amount due for these services, which was laid in the complaint at three hundred dollars. The court charged the jury that the plaintiff was bound to take notice of Boothe's authority to bind defendant, and that the burden was on the plaintiff to prove such authority; that there was no authority vested by law in the deputy sheriff to make contracts to feed and attend to stock levied on under attachment, so as to bind the sheriff personally; that if the jury believed, from the evidence, that Boothe's only authority when he levied on the stock was to

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make arrangements to have the stock kept for their work, and if this could not be done, then to put the mules in defendant's lot, the plaintiff was not entitled to recover." To these charges plaintiff duly excepted.

The jury having returned a verdict in favor of the plaintiff for \$50, the defendant moved to set aside the judgment and dismiss the suit because the recovery was for a less sum than the jurisdiction of the court.

The plaintiff thereupon filed his affidavit that the "sum sued for is actually due, and that a recovery of that amount was prevented by failure of proof; affiant being taken by surprise by the testimony of defendant as to the extent of Boothe's authority, and not having time to get up witnesses to contradict him in that particular, which testimony affiant can produce."

The court granted the motion, and defendant excepted.

The charges given, and the setting aside the judgment on the verdict, are now assigned as error.

L. A. SHAVER, for appellant. — The language of the old statute (act of 1807) is more peremptory than § 2768 of the Revised Code. The affidavit required by each is identical in substance; yet under our decisions the court, after proper affidavit made, had no discretion but to render judgment for the amount of the verdict. *Cummings v. Edmondson*, 5 Port. 145; *McCallister v. McDow*, 26 Ala. 453; *McClure v. Lay*, 30 Ala. 208; 13 Ala. 460. The words "*to be judged of by the court*" evidently relate to the words immediately preceding: "*or some other sufficient cause.*" The power to feed and care for the stock is a necessary incident to the power to levy on them. Besides, the regular deputy is the general agent of the sheriff, and secret instructions to the deputy are not admissible against appellant unless brought home to him. Story on Agency, § 85, ed. of 1859; 1 Brick. § 44, p. 56.

STONE & CLOPTON and BLAKEY & FERGUSON, *contra.* — Whoever deals with an agent is bound to know the extent of his authority. *Gullet v. Lewis*, 3 Stew. 23; 9 Port. 210; 21 Ala. 317; 27 Ala. 16. The charges given were therefore free from error. Plaintiff's affidavit might have been good if he had stopped at the words "failure of proof;" it goes on to specify in what this failure consisted, and shows not a "failure of proof," but if anything a *surprise* caused by *too much proof* on behalf of his opponent. § 2768 R. C. There is eminent fitness in leaving the causes "*to be judged of by the court*," especially where "failure of proof" is relied on. "Failure of proof" is *one* cause; the "*other*" causes are to be judged of

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by the court without doubt. Why except from the judgment of the court the "failure of proof" when that is relied on? The spirit and reason of the statute forbid it. The words "*to be judged of by the court*" qualify each of the disjunctive clauses in the statute.

MANNING, J.—The plaintiff in this cause having made an affidavit according to § 2768 of the Revised Code, that the amount sued for was actually due, and that "the recovery of the true amount was prevented by failure of proof,"—we think the verdict should have been permitted to stand. The words in the section, "to be judged of by the court," are to be referred to the immediately preceding clause, to wit, "or some other sufficient cause." The causes mentioned in the section are to be held sufficient, according to the decisions of this court on the prior similar statute,—more especially as the enactment does not seem to contemplate an issue upon the affidavit, and the introduction of contrary evidence.

By section 817 of the Revised Code, a sheriff is required to "have one deputy, and may have as many as he thinks proper." A full deputy sheriff, as Boothe was, according to the evidence in this cause, must in this State be considered a general agent for his principal. As such he must be presumed, when he seizes goods upon an attachment or execution, to have authority to provide for the safe keeping of them, by committing them to a bailee; and to engage such bailee, if the goods be live-stock, to give them food, water, and proper care. A citizen may undertake such service upon an engagement or at the request of a deputy sheriff, and will be entitled to compensation for the performance of it, upon the presumption that the deputy has authority from his principal to make such an arrangement for the custody and preservation of the property seized. Such a transaction comes within the scope of a sheriff's duty, and may be entered into by his deputy, as his general agent.

If the deputy has instructions limiting his authority in this particular,—the person with whom he deals is not affected by them, unless they be brought to his knowledge.

The authorities referred to by appellee relate to the authority of special agents,—in respect to whom, those who deal with them must at their peril ascertain the extent of the power confided to them by their principals.

The first three charges given by the court and excepted to are in conflict with the law, as herein set forth.

For the errors indicated, the judgment of dismissal is set aside, the judgment on the verdict reversed, and the cause remanded for re-trial in the court below.

Holmes v. Weaver.

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Action on Injunction Bond to recover Counsel Fees.

Attorneys' fees; when recoverable in injunction suit.— Counsel fees incurred in defending an injunction suit in the chancery court and procuring its dissolution may be recovered in an action on the bond, conditioned according to § 3430 R. C., after the dissolution of the injunction.

APPEAL from Circuit Court of Dallas.

Tried before Hon. MILTON J. SAFFOLD.

The appellant brought this action against Weaver, a surety, to recover damages for the breach of an injunction bond.

The complaint contains two counts. The first sets forth the bond, avers that the injunction was wrongfully sued out, and has since been dissolved and bill dismissed, and that by reason of suing it out plaintiff sustained damage to the extent of five hundred dollars, by being forced to employ counsel to defend against the injunction, and to obtain a dissolution, at and for said sum, which was a reasonable and necessary expense incurred by the plaintiff. The second count was the same as the first except that it claimed damages for keeping plaintiff out of the use and occupation of a tract of land, &c., the value of the rent, &c., being five hundred dollars.

The court sustained a demurrer to each count of the complaint, on the ground, in substance, that no right of action for damages was disclosed by the complaint; and this ruling is now assigned as error.

PETTUS & DAWSON, for appellant. — The principle on which appellant's action is maintainable has been several times decided by this court. *Ferguson & Scott v. Baber*, 24 Ala. 406; *Miller v. Garrett*, 35 Ala. 100; *Metcalf v. Young*, 43 Ala. 643; *Seay v. Greenwood*, 21 Ala. 491. See also *Garret & Hill v. Logan*, 19 Ala. 344. This precise question was settled in *Noble v. Arnold*, 23 Ohio State, 264. The purpose of the statute in exacting the bond is to make the defendant whole—to reimburse him for damages, whether they result from a good or bad motive in suing out the injunction. Employing an attorney to defend is a direct, immediate, and natural result of the suit brought.

MORGAN, LAPSLEY & NELSON, *contra*. — This precise question has not been decided in this court. The cases only support the recovery of attorneys' fees where the injunction was sued out *maliciously*. The weight of authority is against appellant's theory of the law. *Roberts v. Mason*, 10 Ohio

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State, 282; *Gadsden v. Bank of Georgetown*, 5 Richardson, 343; *Olrichs v. Spain*, 15 Wallace, 230; *Guyon v. Terrill*, 1 Blackf. C. C. Reports, 244; 3 Dallas, 306; 13 Howard, 363.

JUDGE, J. — Can counsel fees incurred in defending against an injunction suit in the court of chancery be recovered in an action upon the injunction bond, instituted after a dissolution of the injunction, the condition of the bond being, as prescribed by the statute, “to pay all damages which any person may sustain by the suing out of the injunction, if the same is dissolved?” This is the principal question presented by the record in the present case for our determination.

It is contended by counsel for the appellee, that such fees are recoverable only in cases where exemplary or vindictive damages are allowed. We cannot subscribe to the correctness of this view; but hold, as was held by this court in *Seay v. Greenwood* (21 Ala. 496), which was a suit on an attachment bond, “that there is no just or sound reason why the consideration of these expenses, in the estimation of damages by the jury, should be confined to cases of malice.” And in a subsequent case, which was an action on a detinue bond, with a condition similar to the condition of the bond sued on in the present case, it was held that counsel fees for defending the suit were recoverable. *Ferguson & Scott v. Baber's Adm'r*, 24 Ala. 402. We can see no distinction in principle, as to this question, between the cases above cited and the one before us.

It is also contended that such damages do not follow as a necessary result from the grant of the injunction, and that, consequently, they are too remote, uncertain, and contingent to be allowed. The same question was made in *Ferguson & Scott v. Baber's Adm'r*, *supra*, and it was there held that “the employment of counsel to defend is a consequence which naturally or ordinarily results from bringing a suit to assert and maintain a controverted claim; and that the fees paid to them, in order to make defence, legitimately constituted a portion of the damages to which the defendant was subjected within the meaning of the condition of the bond,” &c. We concur in and adopt the conclusion thus attained in that case. See also *Miller v. Garrett*, 35 Ala. 96.

Whatever may have been decided elsewhere as to the question involved, we feel constrained to adhere to the previous decisions of this court in cases analogous to the present, cited upon the brief of counsel for the appellant, in which it has been held that counsel fees are recoverable as damages legitimately flowing from a breach of the condition of the bond.

The court below having erred in its ruling upon the question, the judgment must be reversed, and the cause remanded.

[Hughes v. Taylor.]

Hughes v. Taylor.*Action for Use and Occupation of Land.*

Bill of exceptions; how construed.— A party introducing evidence on the examination in chief, or drawing it out on cross-examination, thereby affirms its admissibility, and cannot afterwards move to exclude it; and in the absence of recitals in the bill of exceptions showing to the contrary, it will be presumed, to sustain the ruling of the court below, that the evidence was offered by the party excepting.

APPEAL from Circuit Court of Baldwin.

Tried before Hon. JOHN ELLIOTT.

The appellee, Sarah Taylor, brought this action against appellant, T. J. Hughes, for use and occupation of land, and recovered judgment in the court below for one hundred and twenty-five dollars.

According to the bill of exceptions reserved on the trial, but not professing to set out all the evidence, the plaintiff testified that when she first knew the lands they belonged to one De Lauie, whom she boarded, he agreeing to pay her in land. He died without having made payment, and she presented an account to his administrator, who sold the land for the payment of the debt, which was the only one presented, and one Blood Taylor, with whom plaintiff lived many years as his wife, as plaintiff's agent, bid off the land for her, but took a deed in his own name. Since De Lauie's death plaintiff has been in possession. Wilkins, who was De Lauie's administrator, testified "that Taylor bought the land, bidding as plaintiff's agent; he paid no money except the costs, but receipted plaintiff's account." The bill of exceptions then recites that "the deed from Wilkins to Taylor was made to Blood Taylor alone; on its face plaintiff's name was not mentioned. The deed bears date in 1869, a copy of it was recorded and was read to the jury. Blood Taylor, on the day the deed was executed to him, mortgaged the land to McGuire, and said mortgage is still unpaid. The deed to B. Taylor (which is not set out) was absolute on its face. The defendant moved to take from the jury all the evidence of the plaintiff tending to show in her an equitable title against Blood Taylor, and because it tended to add to and contradict the face of the deed read by the plaintiff. This the court refused, and the defendant excepted. Wilkins further testified that he had known the land for many years and as far back as the year 1836. The father of De Lauie, of whom plaintiff spoke, was once in possession, and after the father the son remained in possession, and after his death the plaintiff remained in possession. Wilkins further testified that it was the verbal understanding between him and

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Taylor that Taylor was bidding for plaintiff, and therefore the deed was made to him, without payment of the bid. As to the verbal understanding, and the reasons of making the deed to B. Taylor, the defendant objected."

The rulings of the court, to which exceptions were reserved, are now assigned as error.

GOLDTHWAITE & TAYLOR, for appellant, cited *Jones v. Trawick* (31 Ala. 356), and *Bragg v. Massie* (38 Ala. 106), to show the inadmissibility of the evidence objected to. They contended that a proper construction of the bill of exceptions would not authorize the presumption that appellant had introduced or drawn out the evidence to which he objected — laying stress on the fact that the first objection was to "*all of the evidence of the plaintiff*," &c. They cited on this point 42 Ala. 158; 24 Ala. 274.

E. S. DARGAN, *contra*.

BRICKELL, C. J. — A bill of exceptions is construed most strongly against the party excepting. All reasonable presumptions are indulged to support the rulings of the primary court. It does not appear from the bill of exceptions which party introduced the witnesses testifying to the facts supposed to be inadmissible; nor whether these facts were drawn out on the examination of the plaintiff or defendant. It appears only that the appellant moved the exclusion of the evidence after it had been given; that the motion was overruled, and he accepted. If the evidence was offered by the appellant, whether on an examination in chief or drawn out by him on a cross-examination, he could not move its exclusion. *Edgar v. McArn*, 22 Ala. 796; *Furlow v. Merrill*, 23 Ala. 705. Introducing it on an examination in chief, or drawing it out on cross-examination, is a concession of its admissibility. If it was found subsequently to operate against him, he could not deprive his adversary of the right to use it, and its introduction is his own act, of which he cannot complain. It is not inconsistent with any fact stated in the bill of exceptions, to presume the evidence was drawn out by the appellant. If the fact was otherwise, it should have been stated. Presuming in support of the rulings of the circuit court the evidence was introduced by the appellant, there was no error in refusing its exclusion.

The judgment is affirmed.

[Eads v. Murphy.]

Eads v. Murphy et al.

Action on Promissory Note by Transferee against Maker.

1. *Demurrer; no objection allowed unless distinctly stated.* — Under § 2656 R. C., however insufficient pleadings may be in other respects, yet if not obnoxious to the particular grounds of demurrer assigned, the demurrer should be overruled.

2. *Defences against transferee of note.* — It is a good defence to a suit by the transferee of a note given for land, that, before notice of the transfer, the money due thereon was deposited with a third person, by request of the payee, to be paid to him on his conveying the land to the purchaser.

3. *Set-off, when allowed.* — Whenever the vendee can maintain a cross-action at law, because of matters arising out of the contract of purchase, or because of the vendor's breach of the contract, and the damages recoverable are fixed by a legal standard, such damages may be insisted on by way of set-off.

4. *Injury presumed, from error.* — Whenever a demurrer is improperly sustained to one or more special pleas, the presumption of injury arises, and will compel a reversal, unless the court can clearly see from the record that the party interposing such special pleas not only could have had, but did have, under some other plea, the benefit of the defence set up by his special pleas.

APPEAL from Circuit Court of Sumter.

Tried before the Hon. JAMES Q. SMITH.

[Suit by appellees, against appellant, as transferees of a note executed by him to Inge & Blocker.] Appellant pleaded, in short by consent, 1st, the general issue; 2d, payment, and 3d, recoupment. For a fourth plea, he alleged that the note sued on (together with another note) was executed by him to Inge & Blocker, and given for land (describing it); that prior to making the note Inge & Blocker executed to him a title bond, agreeing to make titles to him to the land, on payment by him of the purchase-money; that he offered the amount of the note to the payees, and demanded a conveyance of the land, and at their request, he deposited the money with one Tureman to be paid to them upon their making the conveyance; that they have failed and refuse to make the conveyance, and that the consideration for the note has failed.

The fifth plea avers that the note was given for land, and that I. & B. gave their title bond to appellant (as above set forth), and avers that before commencement of this suit, appellant tendered the money due on the note to the payees, and demanded a conveyance of the title according to the contract; that they failed and refused to convey, and that appellant has always been ready to comply with the contract by paying the money.

The sixth plea is like the fifth, with the additional allegation that Inge & Blocker are both dead, and that a title cannot now be made to defendant because of their death, and that defendant is damaged one thousand and sixty dollars, which he prays to be allowed to him as a set-off.

As a seventh plea defendant alleged the sale by Inge & Blocker.

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Blocker to him, and his execution of the two promissory notes, as set forth above, and he then avers that Inge & Blocker, at the time of the sale, falsely represented to him that the title to the land was perfect and complete in them, and that they had a right to convey, and that he, believing the land to be free from all incumbrance, did agree to purchase the same, and not otherwise, and thereupon he executed the notes; that at the same time Inge & Blocker executed a bond to make titles to the land on payment of the notes (which bond is set out literally); that one of the notes was paid in full, and a part of the one sued on was paid; that Inge & Blocker, at the time of the agreement to sell, did not have title to said land, and have not acquired title since, and that the title is in some person unknown to defendant; that before the assignment of the note to plaintiffs, defendant gave notice to Inge & Blocker that he was ready and willing to pay the note upon their complying with their contract, and making him a title, which they refused and were unable to do. It then sets forth (as in plea above) his deposit of the money with Tureman, under agreement with I. & B. to be delivered to them on their making the conveyance, and their refusal and neglect to make it, and that he is damaged in the sum of one thousand and sixty dollars, which sum he prays to be allowed him as a set-off.

The demurrer recites, "Plaintiff demurs to pleas, because," setting forth the following grounds: 1. The pleas, although reciting that the note was given for the purchase of land, do not aver an entire failure of consideration, or a rescission of the contract. 2. That without averring an entire failure of consideration or a rescission, they show that the note was to be paid at an appointed time before the title was to be made to defendant. 3. They show that the note was given for land, and without averring an abandonment of possession, and the tender of what was due, and a demand for title, and a refusal, they set up the defence that the vendor has no title. 4. They set up fraud in the sale as a defence, without averring that defendant did not rescind and retain possession of the land. 5. The plea of tender was insufficient, for failing to aver that defendant brings the money into court.

The following judgment was rendered on the demurrer: "This day came the parties by attorneys, and plaintiff's demurrer to defendant's special pleas being heard, was sustained by the court, to which defendant excepted, and leave was given to defendant to plead over." Defendant then filed three "new pleas;" the 1st sets forth the purchase of the lands and execution of the notes therefor, by the defendant, and that he received from the vendors a bond for titles; that a quarter section of the land, of the value of \$1,060, was, at the time of

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the sale, and is now, in the adverse possession of one Collawn, and is held by him by deed, and that no title to said quarter section has ever been made to defendant, and that he is damaged thereby in the sum of \$1,060, which he prays may be allowed him as a set-off. The 2d "new plea" shows, in addition to the above, that the vendors agreed to put defendant in possession of the lands bought, and that they failed and refused to put him in possession of a quarter section thereof (describing it), to defendant's damage, in the sum of \$1,060, which he asks to be allowed as a set-off. The 3d "new plea" avers the purchase of the lands and execution of the notes by defendant, as above shown, and that then and there the vendors contracted to convey the land to him by making a good and sufficient title thereto; that such title was not made to him, either at the time of the contract or since; that it was held adversely to the vendors, and that defendant never acquired, nor has now, possession of said lands, and that he is therefore damaged in the sum of \$1,060, which he prays to be allowed as a set-off.

Plaintiffs demurred to these pleas: 1st. Because they are insufficient, for the reasons set forth in the first demurrer. 2d. Because said pleas do not allege that defendant used any effort to get possession of said lands, nor that he has not converted said lands to his use by sale or otherwise, nor received any consideration thereof. 3d. They do not consist of such a succinct statement of the facts relied on that a material issue can be taken thereon. 4th. They do not set up facts upon which, if established, the law is capable of measuring accurately [the damages?] by a pecuniary standard.

This demurrer was also sustained, and defendant excepted, and verdict and judgment rendered for the full amount of the note, from which defendant appeals.

COBBS & SPROTT, with whom was R. H. SMITH, for appellant. — The effect of the vendor's undertaking was that there should be quiet possession, and that they would make title in a reasonable time. 19 Ala. 34; 32 Ala. 44; 2 Ala. 425. Defendant could not sue for the quarter section held adversely. 4 Kent's Com. 447 to 450. The pleas show a breach of the vendor's contract, and a right of action therefor in the defendant; 4 Port. 528; 32 Ala. 215; and payment by him is not necessary. 19 Ala. 34. Retention of possession by vendee will not defeat the action. 4 Port. 528. Refusal or inability of vendor to convey dispenses with necessity of vendee's tendering a deed. 17 Ala. 74, 318; 37 Ala. 619. The value of the land at the time of the breach, and interest, is the measure of damages. 9 Ala. 252; 19 Ala. 744. To sustain the plea of fraud, it is

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only necessary to show that the representations were false. 34 Ala. 669. The liability of vendors to vendees on their contract is good as a set-off. Rev. Code, §§ 2642, 3233; 38 Ala. 641; 27 Ib. 203; 29 Ib. 672; 38 Ib. 382; 42 Ib. 231, 275. The demurrers were not taken to each plea severally, and though there should be one or more faulty pleas, the demurrers should have been overruled, according to well settled practice. And no other grounds of demurrer should be considered than these specially assigned. Rev. Code, § 2656, and authorities cited in foot-note. Defendant had the right to recoup, independent of the statute of set-off. 13 Ala. 584. Although the general issue was in, it is not to be presumed that appellant had the benefit of the defence under this plea. The presumption is that the court adhered to the law as laid down in its rulings on the demurrers; and the rule is, that when error appears, injury will be inferred unless the contrary appears. 1 Brickell's Dig. 780, § 100; 11 Ala. 801. Again, the defence of set-off is unknown to the common law. 18 Ala. 767; Minor, 2; Rev. Code, § 2639. Under this section of the Code, the general issue only covers defences which *deny the cause of action* set forth.

W. P. WEBB and R. CRAWFORD, *contra*. — If the court erred in sustaining the demurrers to the special pleas, it was error without injury. 36 Ala. 140-1; 34 Ala. 512, 515; 26 Ala. 341; 24 Ala. 521; 17 Ala. 699. The cause was tried on the pleas: 1. General issue; 2. Payment; 3. Recoupment, in short by consent, and defendant might have had and did have, under these pleas, all the benefit of the special matters of defence which were specially pleaded. 36 Ala. 140; 34 Ala. 512; 34 Ala. 201; *Martin v. Whitney & Rice*, in MS. June term, 1872. The third, fourth, fifth, sixth, and seventh special pleas were bad on demurrer, because they do not aver that defendant has been evicted, or has abandoned possession, or has rescinded or offered to rescind the contract of purchase. 35 Ala. 259; 1 Ala. 136, 287, 622; 8 Ala. 247. Said special pleas are defective as pleas of tender, because they do not offer to pay, or bring the money into court. Rev. Code, page 679 (Plea of Tender); 36 Ala. 698; 25 Ala. 176. They are also defective for failing to aver that defendant prepared and tendered a deed. 17 Ala. 318; 5 S. & P. 450; 7 S. & M. 214. The seventh special plea does not aver that the representations of the vendors were *fraudulent*, and that defendant was injured by the false representations. See 29 Ala. 395; 1 S. & P. 490. Taking it most strongly against the pleader, it does not show that defendant was actually deceived and injured by such representations. 29 Ala. 668, 672. It is true

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that in *Martin v. Wharton* (38 Ala. 637), this court held that the Code has changed the former rule, and allows the defence of set-off for partial failure of consideration, in suits on notes given for purchase-money of land ; but in this case defendant's pleas furnish no *criteria* by which his damages can be certainly measured. After paying the first note in full, defendant cannot plead set-off to the note assigned. 13 Ala. 259 at 267-8 ; 12 Wend. 355 ; 6 Dana, 223.

BRICKELL, C. J. — 1. The statute declares, " No demurrer in pleading can be allowed but to matter of substance which the party demurring specifies ; and no objection can be taken or allowed which is not distinctly stated in the demurrer." R. C. § 2656. The construction this statute has received conforms to its language : that when a demurrer is interposed, the court cannot consider any other objection than is specifically stated. *Cotton v. Rutledge*, 38 Ala. 116 ; *Holley v. Younge*, 27 Ala. 203. However insufficient the pleading may be in other respects, if it is not obnoxious to the particular objections assigned, the demurrer must be overruled.

2. The demurrer interposed seems to us to be founded in a misconception of the character and construction of the fourth plea. The *gravamen* of this plea is not the want of title in the vendors to the lands sold, nor a breach of their obligation to convey, as they had covenanted in the bond for title. The substantial ground of defence is, that the defendant after the making of the note, the foundation of suit, offered to make payment to the payees, and demanded a conveyance of the lands, and then, at the request of the payees, deposited the amount with a third person, to be paid them on the making by them of a conveyance. If such an agreement was made before the assignment of the note to the appellees, or before notice to the appellant of the assignment, it was valid, and being performed by the appellant is a bar to this suit. Parties before or after the consummation of a contract may annul, rescind, modify, or change it at pleasure, and no other consideration is necessary to support the change or rescission or modification, than the mutual agreement of the parties. 1 Brick. Dig. 394, § 233. This agreement being performed by the appellant, was as to him executed. He was discharged from liability on the note, and the right of the payees was to the money he had deposited. This right was conditional, dependent on the making of a conveyance of the lands. The plea may be defective, in not averring this agreement was made before the assignment of the note to the appellees, or before notice of it to the appellant. That, however, is not a cause of

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demurrer assigned, and we cannot consider it. The plea was not obnoxious to any one of the causes of demurrer specified, and the court therefore erred in sustaining the demurrer.

3. The fifth plea was obnoxious to the specific causes of demurrer. It is pleaded in bar of the action, and avers only that the consideration of the note was the purchase-money of lands; that cotemporaneous with the making of the note, the payees gave a bond to make a good title on the payment of the purchase-money; that after the maturity of the note, the appellant tendered to the payees the money due thereon, and demanded a conveyance of the lands, which they refused to make. The plea, as we have said, is in bar of the action. It is not a plea averring a right to damages, because of the payees' breach of the bond for title, and offering to set them off against the plaintiff's recovery. Such a plea would in effect acknowledge the justice of the plaintiff's demand, and set up an opposing demand to counterbalance it. This plea denies the justness of the plaintiff's demand, and sets up facts which are supposed to be in destruction of it. As a plea in bar it cannot be sustained. It does not aver that there has been a rescission of the contract of purchase of the lands, nor an eviction, nor an abandonment of possession. It simply avers that the payees failed to keep their covenant to make title. No principle is better settled in this court than that a vendee of lands, who has gone into possession, accepted a bond for title, and given his notes for the purchase-money, cannot at law resist a recovery on the notes, so long as the contract of purchase is unrescinded and he remains in possession. *George v. Stockton*, 1 Ala. 136; *Helvenstein v. Higgason*, 35 Ala. 259. The demurrer to this plea was properly sustained.

[4. The sixth plea is a plea of set-off, and avers the consideration of the note was the purchase-money of lands, which the payees bound themselves to convey to the appellant on the payment of the purchase-money; that at the time it was payable, the purchase-money was tendered, and a title demanded, which the payees failed to make; that thereby the appellant had sustained damages to the amount of one thousand and sixty dollars, which he claims as a set-off.] The plea is bad, because it does not aver that a conveyance was prepared and tendered to the vendors for execution. The duty of preparing and tendering the conveyance under our decisions rests on the vendee, and he cannot place the vendor in default without having performed it, or alleging some sufficient excuse for the failure. 1 Brickell's Dig. 311, 569. The insufficiency of the plea in this respect is not, however, assigned as a cause of demurrer. [The objections taken, so far as this plea is concerned, resolve themselves into this: that the demand preferred as a

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set-off is for unliquidated damages, which are not the proper subject of a set-off. This was certainly true under the statute of set-off existing prior to the Code. Then, only debts on which an action of debt, *indebitatus assumpsit*, could be maintained, were the proper subjects of set-off. Unliquidated damages, though arising out of the breach of contract, and though the law furnished the criterion by which they were to be measured, could not be sustained as a set-off. Hence, in *Dunn v. White* (1 Ala. 645), and in *Cole v. Justice* (8 Ala. 793), it was held the payment of an outstanding incumbrance by a purchaser of land, with a covenant either express or implied from the vendors against incumbrances, could not be set off against a recovery of the purchase-money. The Code has relaxed the severity of the former statutes, and authorizes the set-off of not only mutual debts, but liquidated or unliquidated demands, *not sounding in damages merely*. R. C. § 2642. A demand does not sound in damages merely, if, when the facts on which it is based are ascertained, the law measures them accurately by a pecuniary standard. *Holley v. Younge*, 27 Ala. 203. In this case, a set-off of the amount paid by a vendee in extinguishing an outstanding vendor's lien, an incumbrance on the premises, was allowed, in an action for the recovery of the purchase-money. In *Gibson v. Marquis* (29 Ala. 668), damages for a false representation as to the liability of the lands to overflow were declared a proper matter of set-off, in an action on the note for the purchase-money. The same ruling was reaffirmed in *Kanady v. Lambert*, 37 Ala. 57; *Salter v. Phillips*, 38 Ala. 382. In *Bell v. Thompson* (34 Ala. 633), and in *Nelms v. Prewitt* (37 Ala. 389), a demand for damages, on account of the vendor's breach of warranty and a deficiency in the quantity of land sold, was held a good set-off, in an action on the notes for the purchase-money. In *Martin v. Wharton* (38 Ala. 637), it is asserted that a cross demand growing out of a defect in the vendor's title is available as a set-off, in an action on the notes for the purchase-money, although the purchaser is in possession. The rule deducible from these authorities is, that whenever the vendee can maintain a cross-action at law, because of matters arising out of the contract of purchase, or because of the vendor's breach of the obligations of the contract, and the damages recoverable are fixed by a legal standard, such damages may be insisted on, as a set-off to an action for the purchase-money.

The note for the purchase-money having matured, it was the legal right of the vendee to tender the purchase-money, and demand of the vendor a conveyance of the lands. If the conveyance was refused, the condition of the bond for title was broken, and the vendee could elect to proceed at law for

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the recovery of damages, or apply to a court of equity for a specific performance.] If he elected to proceed at law, his remaining in possession would not defeat the suit. *Haynes v. Farley*, 4 Port. 528. [The non-payment of the purchase-money would not bar the action, but would be considered in reduction of damages. *Allen, Adm'r, v. Greene*, 19 Ala. 34. The sixth and seventh pleas are not, of consequence, subject to the demurrer interposed. They disclose a good set-off to the action. The value of the land, at the time of the breach of the obligation to convey, with interest thereon to the time of trial, is the measure of damages the vendee is entitled to recover. *Pinkston v. Hail*, 9 Ala. 252; *Whiteside v. Jennings*, 19 Ala. 741.]

5. The demurrer to these pleas having been sustained, the appellant, by leave of the court, filed three additional pleas. To these pleas the appellees interposed a demurrer, assigning the same and additional causes of demurrer. One of the additional causes of demurrer is, "that the pleas do not consist of such a succinct statement of the facts relied on, as that a material issue can be taken thereon," pursuing in effect the language of the statute. R. C. § 2638. The first of these pleas, averring the consideration of the note sued on was the purchase-money of lands, to which the vendors by bonds covenanted to make the appellant a good title, proceeds to aver that a part of the lands were at the time of the purchase held adversely to the vendors, and that such adverse possession continued to the time of pleading. The value of the land is averred, accompanied with the averment that title had not been made to the appellant. The plea then claims as damages the value of the lands so adversely held, and proposes such damages as a set-off.

The general rule is, that a plea of set-off must disclose a state of facts, which would entitle the party pleading it to maintain an action, if he were the plaintiff in the prosecution of a suit. *Crawford v. Simonton*, 7 Porter, 110. The facts stated in this plea, if embodied in a complaint, would not disclose a substantial cause of action. The bond for title is not set out, nor is its substance. No fact is stated from which a breach of its stipulations can be legally deduced. It may or may not have covenanted for an immediate transfer of the possession of the lands to the vendee. Such must have been its legal effect before an adverse possession at the time of its execution could be assigned as its breach. The material issue which could be formed on this plea would involve the inquiry, whether an adverse possession existing at the time of the sale, and preventing the vendee from obtaining possession, was a breach of the bond for title. The plea does not state the facts on which such issue could be formed, and it is, of consequence, obnoxious to the cause of demurrer we have recited above.

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6. The second additional plea varies from the first, in averring expressly that the vendors agreed to place the vendee in possession. If such was the agreement or contract of the parties, and the lands or a part thereof were adversely held, and the vendee did not, and could not obtain possession, a breach of the contract would occur, authorizing the vendee to sue at law. Damages for this breach under our statute, and the decisions to which we have referred, would be available as a set-off. We would hesitate to affirm that the plea in its present form is capable of a material issue. As the case must, for the errors already noticed, be reversed, and the plea can be amended, we will waive any expression of opinion on this question. The third additional plea is bad, for reasons already stated.

It is insisted by the counsel for the appellees, that although the demurrer to one or more of the special pleas should not have been sustained, yet as, under pleas which were not demurred to, the appellant could have had the benefit of any defence they may present; sustaining the demurrer was error without injury. The decisions on this point are not very harmonious. The true rule we think is, that when error is shown the presumption of injury arises, compelling a reversal, unless the presumption is clearly repelled by the record. This presumption is not repelled, unless we can see that a party interposing a special plea, to which a demurrer is erroneously sustained, not only could have had, but that he did have, the benefit of the defence such plea presents, under some other plea. That is not apparent from this record, and we cannot withhold a reversal.

The judgment is reversed and the cause remanded.

Chickering & Sons v. Bromberg.

Action on Account or Verbal Contract.

1. *Action on account or verbal contract.* — The first count as given in the form of complaint prescribed by the Revised Code for action "*on account or verbal contract*," is so vague and indefinite that it would not be admissible as the statement of a cause of action if it had not been prescribed by law.

2. *Same; for what recovery may be had under.* — Where the manufacturer agrees to take back a piano if defective, and the purchaser tenders it back for that reason, but retains it at the manufacturer's request until a new instrument can be sent on, and this is not done in a reasonable time, the purchaser may refuse to receive one if sent, and under this count may recover the amount of an account made up of items consisting of the price paid, and the expenses of boxing and insuring the piano while it remained awaiting shipment to the manufacturer.

APPEAL from City Court of Mobile.

Tried before Hon. C. F. MOULTON.

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The point decided sufficiently appears from the opinion.

BOYLES & OVERALL, for appellant. — Appellant's brief did not come into Reporter's hands.

ALEX. MCKINSTRY, *contra*. — The charge was not erroneous. 18 Ala. 264; 8 Ala. 567; 2 Ala. 749; 11 Ala. 345; 4 Ala. 208; 22 Ala. 409; 27 Ala. 574.

MANNING, J. — The complaint in this cause is in the form prescribed by the Code under the head of "*On an account or verbal contract*," — and begins as follows: "The plaintiff claims of the defendants \$1,412⁴⁰/₁₀₀ dollars, due by account from them on the 29th day of May, A. D. 1871;" — then follow brief counts (as in that form) upon an account stated, and for money paid, and for work and labor done.

The first count, which is quoted in full, shows no consideration, and is so indefinite that it is difficult to understand what was or was not intended to be embraced by or proved under it. But for the fact that it is prescribed by the legislature, it would be wholly inadmissible as a statement of a cause of action; and it seems probable that it was really intended to be introductory only to each of the several causes of action that follow it in parenthesis, and in which a consideration is set forth, instead of a complete count by itself. We incline to think that in the course of transcribing a portion of the first count, as originally prepared, was left out, and that the words quoted above were followed by these, — *for money had and received by defendant for the use of the plaintiff*, or words of the same effect. For we notice that while forms for all the other common counts in assumpsit are furnished, there is none for money had and received; which in practice is, perhaps, the most useful of them all.

However, we have to take the count above set forth as a sufficient one, it being prescribed by the legislature; and the question raised in this cause is, whether under these counts, or any of them, appellee, who was plaintiff below, was entitled to recover of appellants.

Plaintiff below introduced in evidence an account, in which, among other things, he charged defendants with the price he had paid to them for a piano, — and the freight, insurance, and other expenses, with interest thereon, — and testified that this account was correct. It was proved that the piano was defective in "not standing in tune," that is, as we suppose, that the wires, or sounding parts of the instrument, could not be kept in a proper state of tension.

There was evidence tending to show that defendants were

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bound thereupon to take it back; that it was offered back to them by plaintiff; and that assenting to take it back, they requested him to retain it, until they should get out some new instruments of the same sort, which they thought would stand in tune better than this, and of which they would send him one in lieu of that which he had. There was evidence then tending to show that this instrument was boxed up and stored to be returned to defendants, and that after a year or more, they not having sent forward the new instrument, plaintiff declined to take one, if it should be sent, and demanded payment of the sums mentioned in the account, consisting of the costs and expenses and interest referred to; and for these he brought suit.

The court charged, amongst other things, that if this piano was defective when sold, and within a reasonable time after discovering this plaintiff offered to return it, and the defendants thereupon wrote to plaintiff to retain it as set forth, this would amount to a waiver of the immediate return of the piano, and would vest the title in it in defendants, leaving plaintiff bailee thereof for them; and that plaintiff would be entitled to recover of defendants the amount paid for it, and reasonable expenses, &c.; to which charge defendants excepted.

If we give any effect and scope at all to the first count prescribed by the legislature, — as we are bound to do, — we think the several items composing the account of plaintiff (below) against the defendants are provable under the complaint filed in this cause; and that there was no error in the charge excepted to. The objection mainly relied on is, that upon the case made by the evidence, no recovery can be had in the action and under the form of complaint adopted by plaintiff; which objection is overruled. The judgment is affirmed.

Moore, *pro ami*, v. Randolph *et al.*

Bill to enforce Payment of Legacies, &c.

1. *Final decree, what is.* — A decree in chancery which settles only a portion of the equities between the parties is not such a final decree as will support an appeal.

2. *Chancery; what order has not jurisdiction to make.* — The chancery court has no jurisdiction to render a decree against one not a party to the suit, and connected with it merely as *prochein ami*, for the amount bid by the complainants for lands sold under order of the court and reported as paid by the register, who, under agreement of parties, had accepted the draft of the *prochein ami* in satisfaction of the bid. Execution issued on such a decree is void.

3. *Partial decrees condemned.* — Partial decrees, parcelling out a fund in controversy to one or two of several claimants at one term, and to other claimants at

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another term, and so on, are dangerous departures from correct practice, and virtually deprive a party complaining of error of all benefit of appeal.

4. *Same; when appellate court will interfere.* — In such cases the supreme court will, on the application of a party, protect his right by the issue of such remedial writs as may be necessary to insure justice in the particular case.

5. *Appeal, matter of right, not controllable by chancellor.* — An appeal in a proper case is matter of right, and when taken from a decree for payment of money, the register must ascertain, at his peril, whether to allow it. Orders or instructions from the chancellor, prohibiting the granting of the appeal, are void, and will not protect the register, if he disallows an appeal in a proper case.

6. *Appeal and supersedeas; decree during void.* — When a cause is pending in the supreme court on appeal from a moneyed decree, in which the appellants executed a good and sufficient *supersedeas* bond, decrees made by the chancellor affecting the equities and rights of the parties are void for want of jurisdiction.

APPEAL from Hale Chancery Court.

Heard before Hon. A. W. DILLARD.

In this cause there were two separate matters submitted to the court, on separate motions: first, a motion by appellees to dismiss the appeal on the ground that it was not taken from a final decree; and second, an application by appellants for a *mandamus*, or other remedial writ, directed to the chancellor and register of the court below, for the purpose of staying certain proceedings had therein, after such appeal had been taken and errors assigned thereon in this court.

On the 15th of October, 1862, Jane Randolph died in Greene county, Ala., leaving a large estate; she also left a last will which was duly recorded and admitted to probate, and her brother Richard Randolph, one of the beneficiaries, qualified as executor thereof. All of the debts due from the estate were paid off by him, and most of the legacies; among the legacies unpaid by him was one of two thousand dollars to a Mrs. Beverly. By the 9th clause of the will all her lands in Perry county, Alabama, were bequeathed to her brothers Richard and Robert Carter Randolph, and her sisters Harriet B. and Ann T. Randolph, and Mrs. Lucy Tayloe, to be equally divided share and share alike; the property going to the sisters to be held by them to their sole and separate use, free from the control and not subject to be disposed of or incumbered by their husbands, should they marry. On the 13th of May, 1863, Richard Randolph filed an application to the probate court of said county for an order to sell said lands, for division among the parties interested therein; on September, 14, 1863, the court granted the petition and decreed a sale of the lands, on a credit of one, two, and three years, with interest from the day of sale; on the 24th day of October, 1863, the lands were sold as decreed, and in two parcels: one parcel was bought by one Randolph Speddin, and he executed three notes for the purchase-money, for \$8,950²² each, at one, two, and three years, respectively, with interest from date, payable to Richard Randolph, and also signed by said Richard Randolph as surety

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thereon. There was an agreement entered into between Speddin and Richard Randolph, before the sale, that Speddin should bid off the whole of this parcel at the sale, and afterwards should resell a portion thereof back to Richard Randolph. Pursuant to this agreement, Speddin executed his bond for titles to the portion agreed to be resold to Richard Randolph, and in consideration thereof Richard Randolph executed his three promissory notes to Speddin, payable one, two, and three years after date, respectively, with interest from date for the sum of \$1,290 each, and the bond and notes were dated October, 24, 1863. On the same day, and pursuant to a similar agreement with Curry, Speddin made a bond for titles to another part of the parcel purchased by him to Curry, and received therefor Curry's three notes for \$1,001 each, payable respectively at one, two, and three years, with interest from date. The other parcel sold by the executor was bought by Robert Carter Randolph, for which he executed, on the same day, his three notes for the sum of \$1,964⁰⁰, and payable to Richard Randolph as executor, at one, two, and three years, with interest from date. Each of the four purchasers, respectively, went into possession of the lands so bought by him.

Richard Randolph died September 11, 1866; he left a widow, Mrs. Florence E. Randolph, who qualified as executrix of her husband's will, and on the 19th of May, 1868, she made a final settlement of her husband's executorship of the will of Jane Randolph, showing a balance against her husband as such executor of \$1,290⁷⁸. On the 9th of March, 1868, Thos. C. Clark was appointed administrator *de bonis non* with the will annexed of Jane Randolph; and afterwards, Florence E. Randolph having resigned as executrix of her husband's will, Clark was also appointed administrator *de bonis non* of Richard Randolph's estate, and on the 12th of July, 1868, the latter estate was declared insolvent by the probate court. Robert Carter Randolph, before paying up his indebtedness for the lands purchased by him, went into bankruptcy, and his interest in said lands were purchased by one McCrary.

On the 30th of June, 1870, Harriet B. Moore (formerly Randolph), by her husband and next friend Rittenhouse Moore, and Ann T. Hill (formerly Randolph), by her husband R. J. Hill, all of Hale county, both legatees under the will of Jane Randolph, filed their bill in the chancery court of that county, alleging among other things the foregoing facts, and also that they were the legatees mentioned in the will of Jane Randolph as Harriet B. Randolph and Ann T. Randolph, and that a large portion of their legacies respectively, under said will, was still unpaid, and that a very large sum of the purchase-money for the sale of the lands by the executor was still due, and that

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the notes therefor were held by Clark, the administrator *de bonis non* of said Jane Randolph.

The record is exceedingly voluminous, and it is impossible to set forth all the proceedings in it without greatly lengthening this report beyond the ordinary limits. An elaborate contest between the legatees is disclosed as to the amounts received by them respectively, and the widow of Richard Randolph, deceased, propounded her claim for dower in the lands held by Richard Randolph. The administration of the estate of Jane Randolph was removed into the chancery court, and on the 20th day of September, 1872, a decree was rendered ordering sale of the lands purchased from the estate by Spedden and R. C. Randolph, for payment of the balance of the purchase-money unpaid; the lands were sold by the register and bought by complainants, Harriet B. Moore and Ann T. Hill. The register reported the sale to the court, and also reported that the purchasers had paid the purchase-money in full to him, when, in fact, only the costs of the suit were paid in cash; and for the balance the register, as a matter of convenience to the parties concerned, and in view of the fact that the purchasers were more largely interested in the fund than any one else, accepted the check or acceptance of Rittenhouse Moore, the next friend of Harriet B. Moore. On the 12th of December, 1872, the court ordered the register to pay over the purchase-money to Clark, as administrator *de bonis non* of the estate of Jane Randolph, and after the adjournment of court the check or acceptance was delivered to Clark, and by him presented for payment. The payment was refused, and upon petition of Clark, the chancellor, on February 19, 1873, set aside the sale and ordered the lands to be resold. On April 2, 1873, this order was set aside and vacated, on the terms and conditions that, before April 7, 1873, the purchasers at the former sale pay into the Bank of Mobile, to the credit of the register of Hale county, \$1,500 in lawful money, and also pay all costs of suit since December term, 1872.

On the 24th of June, 1874, a decree was rendered in favor of Clark, as administrator *de bonis non* of the estate of Jane Randolph, for \$502.73 on a settlement of his administration of said estate; and upon Clark's motion to have this amount refunded to him out of the proceeds of the sale of the lands in the hands of Rittenhouse Moore, "It was ordered, decreed, and adjudged that the said Rittenhouse Moore pay, within ten days after the adjournment of this court, to the said Thos. C. Clark, out of the proceeds of the sale of the lands in this cause, which are shown to be in his hands, the sum of five hundred and two $\frac{73}{100}$ dollars, and in default thereof, that an execution be issued by the register for said amount." A decree was also

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rendered for costs, and in default of payment by Rittenhouse Moore, execution to issue. The executions issued and were superseded, and an appeal was taken from the decrees so rendered to this court. The amounts due the legatees had not been ascertained and decreed by the court; the dower question raised by the widow of Richard Randolph had not been disposed of; and the estate of Mrs. Jane Randolph had not been wound up.

After the case was brought to this court by appeal, viz., on the 15th of December, 1874, the chancellor ordered the register to reissue the execution in favor of Thos. C. Clark. The register, upon the making of the *supersedeas* bond by Rittenhouse Moore, had recalled the execution then in the hands of the sheriff against him. The chancellor in his decree directing the reissue of execution, recites that the "said notice to the sheriff was not in conformity to law, or the rules of this court, and in direct opposition to the order of this court," &c. On the same day a decree was also rendered in favor of Mrs. Hamilton, formerly Mrs. Beverly, for her legacy against Thos. C. Clark, as administrator *de bonis non* of the estate of Jane Randolph, but to be paid by Rittenhouse Moore out of the proceeds of the lands purchased by complainants, and in default of payment, the lands to be sold by the register, and the decrees paid out of the proceeds of the sale. On the 16th of December, 1874, the chancellor also rendered a decree, "that the register issue an execution in favor of himself against Rittenhouse Moore, the custodian of the proceeds of said sale of lands belonging to the estate of Jane Randolph, deceased," for the sum of \$536²², the amount ascertained by said register to be the dower interest of the said Florence E. Randolph in the interest of Richard Randolph in said lands. The complainants thereupon made application to this court for a writ of *mandamus*, or other appropriate writ, to restrain the proceedings had in the court below subsequent to the appeal to this court.

SMITH & ROULHAC, for appellants, and for motion for prohibition, &c.

WALLER, PITTMAN & WALLER, for motion to dismiss, and in opposition to prohibition, &c.

The motion to dismiss the appeal was granted, the following opinion being delivered thereon by,—

MANNING, J.—In cases of administration transferred from a probate court into a court of equity, "the chancellor
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will take them, in the plight and condition they are in, at the time of the transfer, and proceed with them as in chancery cases, applying the law regulating such estates in the probate court, changing only the mode of procedure, in the same manner as if the cause had originated in his court." *Taliaferro, Adm'r, v. Brown, &c.* 11 Ala. 710; *Hall, Adm'r, v. Wilson's Heirs*, 14 Ala. 295. Some legislation, however, is probably desirable in reference to appeals in cases of administration in equity courts. From decisions that may from time to time be made in the course of administration in probate courts, the statute laws provide that appeals may, from time to time, be taken. Rev. Code, §§ 2244 to 2260. Such appeals bring up for revision only the particular points, or matters involved in the decisions appealed from, with so much of the record, and such of the parties concerned in them, as will enable the appellate court to do justice therein, while the administration, in respect to other matters, may in most cases go on without obstruction in the probate court. This facilitates the transaction of the business of estates, in which frequently it happens that the court must act upon many separate questions and claims, of creditors and others, by orders or decrees made from time to time, successively, which decrees, in respect to such particular matters only, are final, and therefore need, if erroneous, to be speedily corrected.

But the statutes do not give such a right of appeal from partial decrees of a chancellor. Rev. Code, §§ 3485, 3486. If the decree settles only a part of the equities between parties in a cause in chancery, it is not final, in the view of this court. A decree which ascertained and determined all the equities except two items of account, in regard to which a reference was ordered, was held not to be final, so as to authorize an appeal. *Garner v. Prewitt*, 32 Ala. 13; *Bradford v. Bradley*, 37 Ib. 453.

The decree from which the appeal in this cause was taken was not such a final decree as settled all the equities of the case. And the appeal must therefore be dismissed at the costs of the appellant.

The following opinion was delivered on the motion for prohibition:—

MANNING, J. — The acceptance by the register of Moore's check or draft upon himself in lieu of money, for the chief part of the price of the land bought by appellants at the sale of the register, seems to have been the result of an agreement between the parties. Such arrangements may sometimes be advantageous. But the persons who concur in them ought to

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be careful not to permit them to embarrass courts in the performance of their duties. It is not allowable that the plaintiffs in a cause shall be suffered without the consent of the court, though by its action, to get possession pending their suit of the subject-matter of it, and then withhold it so as to hinder the court from distributing it according to law among the parties entitled thereto,—as they had invoked it to do. We do not intend by our decision to signify any approbation of such an interference with the authority of judicial tribunals.

Rittenhouse Moore is not, however, either a complainant or a defendant in this cause. Except as to the costs with which his wife, for whom he is *prochein ami*, might be chargeable, he was not within the jurisdiction of the chancellor. He was no more subject to the decrees rendered against him in favor of other persons who are parties to this suit, than a surety for costs in an action in a common law court would be liable to its judgment for the amount of a set-off that might be pleaded and proved by a defendant against the plaintiff. Those decrees, and the execution upon them against Moore, are wholly void.

In respect to the order of proceeding in this cause: it is a dangerous departure from correct practice for a chancellor in a case like this to make, from time to time, partial distributions of a fund in controversy, of which there are several claimants, instead of disposing of it wholly at one time.

The creditors of Jane Randolph had all been paid before this suit was brought. Nothing remained to be done after the property was converted into money, but properly to divide it among the several legatees, devisees, and others entitled thereto, including the administrator *de bonis non*, &c., in respect to any amount that might be due to him after expenditures properly made in excess of his receipts. And this division should be made by a decree or decrees, which settle at one time the equities of all the parties, and so as to allow, before the execution thereof, an appeal by any party interested.

For any errors committed by a chancellor in a cause of which he has jurisdiction, the usual and proper remedy is by appeal taken to this court, and to prevent loss it may be necessary to have the execution of the decree suspended. But an appeal from a chancery court can be taken only from a final decree, which settles all the equities of the case. Rev. Code, secs. 3485, 3486; *Garner v. Prewitt*, *supra*.

The appeal, moreover, must be taken within the time prescribed by law; and if intended to suspend the operation of the decree, it ought to be taken without delay. Therefore, partial decrees parcelling out the fund to one or two of several claimants at one term of the court, and to one or two others at another term, and so on, directly operate to deprive a party

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complaining of error of the benefit of an appeal. He must be entitled to protection against the deprivation of a right so invaluable. A case is presented in which this court should grant redress by one of those remedial writs which the Constitution expressly authorizes it to employ in order that it may exercise "a general superintendence of inferior jurisdictions." Const. Art. VI. sec. 2. See, also, *Ex parte Morgan Smith*, 23 Ala. 94.

Under our law (Rev. Code, secs. 3485, 3490, 3491) an appeal in a proper case is a matter of right, and when it is taken from a decree for the payment of money it pertains to the register, and not to the chancellor, to determine whether it shall be allowed or not. Orders or instructions from the chancellor prohibiting the granting of it are void, and will not protect the register from responsibility for refusing an appeal to a person entitled thereto. If he disallows or denies it, he does so at his peril.

And when an appeal is in fact taken from a court of chancery to this court, the cause and all the parties to it are brought into this court. The controversy is drawn *ad aliud examen*. And while it remains here the chancellor has no jurisdiction to make any decree upon the equities of the parties which shall change their rights in the subject-matter.

Whether the appeal is wrongfully granted or not, it is for this court, not the chancellor, to determine. Hence, while the cause is actually here, upon an appeal from a moneyed decree, in which the appellants have executed a good and sufficient bond, in more than double the amount of the decree, to suspend the execution of it, — as has been done in this cause, — the decrees then made by the chancellor, affecting the equities and rights of the parties, are void for want of jurisdiction to render them.

It is within the authority conferred on this court, on application to it, to prevent the decrees complained of from being carried into effect.

A rule *nisi* will be issued to the chancellor requiring him on the 25th day of March to show cause in this court why a writ of prohibition should not be issued commanding him to desist from further proceeding to have said decrees enforced and executed, and that he vacate and set aside the same.

And in the mean time a temporary prohibition will be issued to restrain the execution of said decrees, until the further order of the court.¹

¹ This case was decided at the January term, 1875. In sending the manuscript to the publisher, it was accidentally placed among the decisions of the June term, 1875.

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Action on Policy of Life Insurance.

1. *Declaration; what sufficient.* — Under the provisions of the Revised Code a declaration on a policy of life insurance is sufficient if it contain a statement of the contract or policy, followed by a general averment that the plaintiff had complied with all the provisions on his part, and that the defendant had not in a specified way performed his part. The conditions of the policy, whether conditions precedent or subsequent, and their performance, need not be alleged other than in the general allegation of performance on the part of the plaintiff; and although the performance of a condition precedent is averred, proof excusing performance may be made under it.

2. *Policy of life assurance; what not void.* — A policy of life insurance is not void for uncertainty because the beneficiaries are designated only as "children of John Wilson Bledsoe."

3. *Same, action on; what evidence inadmissible.* — Declarations made by the assured after his premium fell due, in the course of a partnership settlement in which he had charged himself with partnership debts collected, that he made the collections to pay the premium, but did not because he was informed by the secretary of the defendant that his policy was cancelled, are mere *hearsay*, and wholly inadmissible evidence in an action on the policy.

4. *Same.* — Evidence that the assured spoke of the premium coming due, and mentioned the source from which he expected to obtain money to pay it, and that the witness offered to loan the requisite amount, which offer the assured said he would take if disappointed, is also mere *hearsay*, and inadmissible testimony for the plaintiffs in an action on the policy.

5. *Ability to pay premium; when evidence of, admissible.* — Evidence of the ability of assured to pay the premium when it fell due, would be admissible in connection with evidence showing a legal excuse for non-payment.

6. *Cancellation of policy; effect of.* — The plaintiff proved payment of the first premium on a policy of life insurance to defendant's agent, and introduced a letter written by the secretary of defendant in answer to the assured's request for an extension of the time in which to pay the second premium, stating that the policy had been cancelled on the books of the company because no payment had ever been made on it, and requesting him if he had made payment to a deceased agent to send the defendant company a certified copy of the receipt, and to state when, where, and to whom the premium had been paid, as no payment had been sent the company, and it had no record of the payment of any premium. *Held*, 1. The cancellation of the policy on the books of the company did not amount to a rescission of the contract, or of itself affect the validity of the policy or the rights of the assured and beneficiaries under it. 2. It was competent for the insurer (the cancellation and letter in relation thereto being relied on as an excuse for non-payment of the premium when it fell due) to show that the cancellation was made in ignorance of the delivery of the policy or the payment of the premium, so as to relieve itself of the charge of an intentional abandonment of the contract with the knowledge that the assured had performed on his part, and was relying on it. 3. The cancellation of the policy and letter written in relation thereto were not a sufficient excuse for failing to pay or tender the premium when it fell due, although the cancellation became known to the assured only a few days before the premium was payable.

7. *Decree of insolvency; when incompetent evidence.* — A decree of the probate court declaring the assured's estate insolvent is not evidence of his insolvency in a suit by his children, beneficiaries under the policy, against the insurance company.

8. *Insurance law; violation of; who cannot invoke.* — The rule that a contract founded on an act prohibited by statute is void, is subject to the qualification that although the legislature may forbid the doing of a particular act, yet unless the act itself is declared void, a party not privy to it, or involved in the guilt of the transaction, may recover of the guilty actor. The insurance company doing business here without complying with the state laws, and not the citizen with

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whom it contracts, violates the statutes, and it cannot avail itself of its own violation of law to avoid its contract.

9. *Non-performance; what necessary to constitute excuse for.* — Where the act of a party, for whose benefit conditions precedent attach, is relied on as an excuse for non-performance, it must be the proximate and not the remote cause of the failure to perform, and be of such a character as to render performance impossible, or induce the belief that it was waived, or if attempted would not be accepted.

APPEAL from City Court of Montgomery.

Tried before Hon. JOHN D. CUNNINGHAM.

This was an action commenced by the seven children of John Wilson Bledsoe, who were all minors suing by their next friend, Nathaniel Bledsoe, against the "Brooklyn Life Insurance Company," to recover the amount of a policy of life assurance which it issued upon the life of their father. The complaint contained two counts. The first claimed of the defendant the sum of \$5,000, with interest, "upon a certain policy of assurance entered into by defendant on the 19th day of February, 1870, for the said sum of \$5,000, and numbered 7742, in and by which it was agreed, in consideration of the payment by plaintiffs of \$203, $\frac{25}{100}$ dollars to defendant, and in consideration of the annual premium of \$203, $\frac{25}{100}$, to be paid on or before the 19th day of February in each year during the continuance of the policy, and in consideration of the representations and agreements contained in the application therefor, the defendant did bind itself to assure and did assure the life of said John Wilson Bledsoe for said sum of \$5,000 unto the plaintiffs for the term of his natural life, with participation in surplus, and did agree to pay to plaintiffs the said sum of \$5,000 within sixty days after due notice and proof of the death of said John Wilson Bledsoe, — the balance of the year's premium and all other indebtedness to be first deducted." The count then avers a refusal to pay for more than sixty days after due notice and proof of the death of John Wilson Bledsoe, and that plaintiffs are his children.

The second count is based on a policy of life assurance, "which the plaintiffs, under the name and style of the children of John Wilson Bledsoe, caused to be made and issued by defendant, whereby the defendant, in consideration of the representations and agreements contained in the application therefor, and of the sum of \$203, $\frac{25}{100}$ to defendant in hand paid by plaintiffs, and a like sum to be paid on or before the 19th of February in each and every year during the continuance of the policy, did on the 19th of February, 1870, assure the life of John Wilson Bledsoe in the sum of \$5,000, unto the plaintiffs for his natural life, with participation in surplus, and did promise and agree with plaintiffs to pay said sum within sixty days after notice of his death and due proof thereof," &c. The count then sets out at length the terms, conditions, and stipu-

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lations upon which the policy was issued, but not the statements and representations made to obtain it, and avers that at the time of making the same, as well as at the time of the death of John Wilson Bledsoe, the person whose life was assured, they were his only children "and interested in his life to the amount for which he was assured," and the "nature of their interest was stated to the defendant on the 19th of February, 1870." The count then avers the death of John Wilson Bledsoe, and that notice and satisfactory proof were made to defendant, and that "although plaintiffs have in all things conformed themselves to observe, performed, and kept in all things the said policy of assurance, and the conditions and stipulations contained on their part and behalf to be performed and observed, according to the form and effect of the said policy of insurance and of the said conditions and agreements," the defendant, for more than sixty days after due notice and satisfactory proof of death, has refused and still refuses payment, &c.

The defendant demurred to both counts. To the first, because the payments of premiums during the continuance of the policy was not averred, and because the representations and terms on which the policy was issued are not stated, nor is it alleged that they have been performed. 2d. Because the contract was made with minors incapable of entering into or ratifying it. The grounds of demurrer to the second count were: 1st. That plaintiffs were minors at the time of the application and statement and making of the agreement, and are still minors incapable of making or confirming the contract. 2d. That it is not specifically averred that each premium was paid on or before the 19th day of February in each year during the continuance of the policy, agreeably to the allegations of its conditions. 3d. Because the representations on which the policy was obtained are not set out, nor is there any allegation as to their truth or falsity. 4th. Because the contract declared on is void for uncertainty — it being made with the children of John Wilson Bledsoe.

The court overruled the demurrer to the second count, and sustained it to the first.

On the trial the plaintiffs offered in evidence the policy of assurance on which the suit was founded. This policy shows that it was entered into on the faith of the representations and agreements contained in the application therefor, "and of the sum of \$203, $\frac{2}{5}$ in hand paid by children of John Wilson Bledsoe," and a like sum to be paid annually thereafter on 19th of February in each year. One of the conditions upon which the policy was issued was, that "if the said children of John Wilson Bledsoe shall not pay or cause to be paid the

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premiums as aforesaid in cash, on or before the day herein mentioned for the payment thereof, . . . then in such case the company shall not be liable for the payment of the sum, or any part thereof, and the policy shall cease and be null, void, and of no effect." It concludes as follows: "In witness whereof the Brooklyn Insurance Company have by their President and Secretary signed and delivered this contract at the City of New York, in the State of New York, this 19th day of February, 1870." The introduction of the policy was objected to, on the ground that it showed a variance between the contract declared on and that disclosed by the policy; the one being a contract with "the children" of Bledsoe, and the other a contract with "children" of Bledsoe. The objection was overruled and the defendant excepted.

The testimony showed that application for the policy was made through one Humphries, an agent of defendant and a resident of Alabama, who delivered the policy in this State, and at the date of the delivery executed his receipt, for the first annual premium, "to the children of John Wilson Bledsoe." This was in March, 1870. Humphries died in the November following, without ever having reported to the "Brooklyn Life Insurance Company" the payment of the premium or the delivery of the policy. The second annual premium fell due February 19, 1871. At that time Bledsoe lived at Midway, Bullock county, Alabama, and continued to reside there until his death, on the 28th of December following. The usual time occupied in the transmission by mail of a letter from Midway to New York, the home office of defendant, was four days. On the 6th day of February, 1871, eleven days before the annual premium fell due, Bledsoe wrote and sent by mail the following letter:—

"MIDWAY, Alabama, February 6th, 1871.

"MR. W. M. COLE, *Secretary Brooklyn Insurance Co.* :

"DEAR SIR, — As my premium is about to fall due, I have concluded to write to the company to beg indulgence upon payment of the next premium. Money is exceedingly scarce and hard to get, owing to the low price of cotton. I notice in my policy that there are no days of grace allowed by your company. I have thought your company might extend. I hate very much to forfeit my insurance, but I am afraid I will not be able to pay my premium at maturity, and I further more hate to lose the money I have already paid. I hope your company will allow me time on my next premium. I will pay it during the year with interest, and am willing to give my note, and if I can spare the money any time soon I will forward it to you. Please let me hear from you soon, as my

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premium is due the 19th inst. Hoping to hear from you soon,
I am respectfully yours,
J. W. BLEDSOE."

This letter, however, was not introduced by the plaintiffs, and without reference to it, they offered in evidence the following letter, which it was admitted was written by the secretary of defendant:—

"February 14th, 1874.

"J. W. BLEDSOE, Esq., Midway, Ala.:

"DEAR SIR,—Yours of the 6th inst. just received. Your policy stands on our books as cancelled; no payment ever having been made to us upon it. If, however, you did pay it to the late Mr. Humphries, please send us a certified copy of the receipt you have for such payment, and also state when and where and how it was paid, as we have no record of any payment, no premium having been sent to us.

"Respectfully yours,

"W. M. COLE, *Secretary.*"

These letters constituted the whole correspondence between Bledsoe and the insurance company. There is no evidence to show that the second annual premium was paid, or that he or any other person ever tendered or offered to pay the premium, although Bledsoe lived some ten months after the receipt of the letter from Cole. The defendant objected to the admission of the letter because the one to which it purported to be a reply had not been produced or accounted for; because Bledsoe was not a party to the contract; and because under the averments of the complaint it was irrelevant and inadmissible. The objection was overruled, and the defendant duly excepted.

The plaintiff then offered in evidence an affidavit of Dr. B. F. Coleman, which it was agreed might be taken instead of his deposition. It appeared from this that Coleman and Bledsoe had been partners in the practice of physic during the years 1869 and 1870; that the partnership was dissolved on the 31st of December, 1870, and on a settlement had on the 16th day of March, 1871, Bledsoe charged himself with four hundred dollars collected from the accounts, "remarking at the time of the settlement that he had intended to use a portion of the same for the purpose of paying a premium on an insurance policy of the Brooklyn Life Insurance Company, which he held at the time of the settlement, had it not been for a letter which he received from said company and which letter disclaimed all knowledge of him, as his name was not in their books." The witness testified he read the letter and knew its contents.

To the admission of this evidence, especially that portion of it which is marked in quotation, the defendant objected, on the ground that it was illegal and irrelevant evidence, being mere

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hearsay and not part of the *res gestæ*. The objection was overruled, and defendant excepted.

The plaintiffs then offered in evidence the deposition of one Daniel. In one of the answers to interrogatories propounded by the plaintiff, Daniel testified that in February, 1871, Bledsoe's accounts and books were worth about two thousand dollars, &c.; that "about this time Dr. Bledsoe came into his office and said that his premium in the Brooklyn Insurance Company would soon be due, and that he had not collected the money to pay the same, 'but had the promise from one of his patrons;' and witness remarked that rather than have him forfeit the policy he would lend him the money, to which he replied that he would call if he needed it. Witness does not know what arrangement he made, as he did not call, but knows his willingness and ability from the foregoing facts." Defendant's objection to the admission of this testimony was overruled, and defendant excepted.

The defendant introduced the depositions of Bouck, the president, Cole, the secretary, and Dutcher, the cashier, of defendant, and on motion of plaintiff the court excluded from the jury the answer of each of these witnesses to interrogatories, showing that defendant had never received any premium on said policy, or report from the agent as to its payment, and had never received any information of the delivery of the policy or payment of the premium, until Bledsoe's letter. To this ruling the defendant duly excepted.

The defendant then offered evidence that the Brooklyn Insurance Company had not made or filed the statements required by law to be made to the auditor, or filed the same in the office of the judge of probate of Bullock, the county in which Bledsoe resided, or obtained any certificate of authority in either of the years 1869, 1870-1871, or otherwise complied with the state insurance laws. On the objection of the plaintiffs the court would not allow this proof to be made, and defendant duly excepted.

The defendant then offered in evidence the decree of the probate court declaring John Wilson Bledsoe's estate insolvent, together with the report of insolvency.

Presentation of proofs of death, &c., was admitted. The foregoing is substantially all the evidence. The court gave a general charge, which need not be further noticed, and at the request of the plaintiffs charged the jury if they believed, from the evidence, "that John Wilson Bledsoe paid on the 4th of March, 1870, the first premium due on said policy of insurance, and on the 6th day of February, 1871, wrote to defendant the letter of that date read in evidence, and in time to have received a letter in reply before the second annual premium be-

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came due and payable, and in reply thereto the defendant wrote the letter dated February 14, 1871, read in evidence, and that said John Wilson Bledsoe had prepared and was ready to pay the second annual premium on the 19th of February, 1871, and was prevented from paying the same in consequence of said letter of February 14, 1871, then the non-payment of the annual premium on the 19th of February, 1871, was not a forfeiture of the policy and no bar to a recovery." The defendant excepted to the giving of this charge, and requested the following written charges: 1. "If the jury believe that the plaintiffs failed to pay or offer to pay the premium on the policy when it fell due, February 19, 1871, and that John Wilson Bledsoe wrote the letter purporting to have been written by him on the 6th day of February, 1871, and received in reply the letter purporting to have been written on the 14th of February, 1871, that said last letter furnishes no sufficient excuse for such failure." 2. "If the jury believe from the evidence that plaintiffs failed to pay or offer to pay the premium falling due February 19, 1871, on that or any other day, that then the letter written by Cole furnished no sufficient excuse for such failure." The court refused to give either of these charges, and the defendant duly excepted.

The various rulings of the court to which exception was reserved are now assigned as error.

ARRINGTON & GRAHAM for appellant. — The demurrer to the second count should have been sustained. The policy being made "on the faith of the statements in the application," appellant was bound to set them out and aver their truth. 66 N. C. 70; 39 Ind. 475; 14 M. & W. 95; 2 Bigelow Insurance Reports, 681. The policy was void for uncertainty. 22 Ala. 673. The designation of one of the contracting parties as "children" of a man, is too vague. The Cole letter was inadmissible. Bledsoe was not a party to the contract. The letter worked no estoppel. It was not relevant to the issue, and the letter to which it was a reply was not produced. Coleman's testimony should have been excluded. What Bledsoe then said, as testified to by Coleman, constituted no part of the *res gestæ* of this transaction, or even of the settlement with Coleman. Defendant was not present. There was no proof that Bledsoe had ever offered to perform the contract by tendering payment of the premium. It was a mere statement of what he *had intended* to do in a time past, about a matter other than that to which the conversation related. It was mere *hearsay*. 1 Greenleaf, §§ 108-10; 20 Ala. 123; 25 Ala. 38; 11 Ala. 698; 31 Ala. 266; 17 Ala. 366; *Pearson & Wife v. Darrington*, 32 Ala. 227. Daniel's testimony was even

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worse. The proof that the company had not complied with the insurance laws should not have been rejected. 1 Brick. § 34, p. 377. This is not a statute for revenue, and it applies as well where the policy is signed outside the State as when made here. The contract cannot be enforced here. *Williams v. Cheny*, 3 Gray, 215; *Hyde v. Goodnow*, 3 Coms. 267; *Huntley v. Merrill*, 627. The payment of each premium as it fell due was a condition precedent to the further continuance of the policy, and it must be paid, or performance waived or excused, before any recovery can be had. The Cole letter was no waiver or excuse for non-performance. It merely stated that the policy taken out through Humphries was cancelled on the books of the company, gave the reason therefor, and asked for information. Even if appellees' excuse were valid, a party cannot acquiesce in the abandonment of a contract—fail to perform or offer to perform his part—and at the same time compel the complete performance by the other side. The contract is reciprocal. If he insists on the contract as continuing, he must allege and prove his readiness to perform his part. In this case there has been no offer to perform, and no allegation even of readiness to perform. If this policy was in force at the time this suit was brought, then it would have continued in force indefinitely as long as Bledsoe lived. The proposition asserted is virtually this: If Bledsoe continued to live, he would acquiesce in the abandonment of the contract; if he died, the beneficiaries would revive and enforce it.

STONE & CLOPTON, *contra*.—The cancellation of the policy was the wrongful act of the defendant. When the defendant notified Bledsoe of it, the company waived the payment of that premium. *Baker v. Union Life Ins. Co.* 37 Howard (N. Y.), 126; May on Life Insurance, §§ 175–88. If not a waiver, it was an act preventing payment, and this coupled with proof of ability to pay will excuse payment. *McKleroy v. Tulane*, 34 Ala. 81. Bledsoe's letter to the company was introduced to show his inability to pay; proof of his ability was competent to rebut this. The evidence of Coleman was admissible. The declarations happened in such a way as to preclude the suspicion of premeditation or design; they related to the settlement, and were coincident in point of time with it, and tended to elucidate it. *Gandy v. Humphries*, 35 Ala. 617; *Kelly v. Phillips*, 29 Ala. 68. They also showed ability to pay, and the fact that the non-payment was induced by the act of defendant. The answers of Bouck, Dutcher, and Cole were properly excluded. The agency of Humphries was not disputed, and the law held the company to a knowledge of the payment. The consequences flowing from it, and the subsequent cancel-

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lation of the policy, cannot be avoided by proof that the defendant did not *actually* know what it is conclusively presumed to know. Our insurance statutes were passed to protect and not to *snare* our citizens. The violation of these laws by the defendant does not absolve it from the contract. The statutes do not declare the contracts *void*. The appellees are not guilty actors in the transaction. *Whetstone v. Bank of Montgomery*, 9 Ala. 875; *Bank of Montgomery v. Crocheron*, 5 Ala. 250; *Pistole v. Street*, 5 Port. 64; 25 Ala. 266; 1 Stewart, 278. The evidence of excuse for non-payment was admissible under the complaint. Rev. Code, § 176; 9 Porter, 300; 7 Porter, 175.

BRICKELL, C. J.—The Code provides, “All pleadings must be as brief as is consistent with perspicuity, and the presentation of the facts or matter to be put in issue in an intelligible form; no objection can be allowed for defect of form, if facts are so presented that a material issue in law or fact can be taken by the adverse party thereon.” R. C. § 2629. Again, “Any pleading which conforms substantially to the schedule of forms attached to this part is sufficient.” R. C. § 2630. Independent of statutory provisions, the rules of pleading are the same in their application to the contract of insurance as to other contracts. The contract or policy of insurance must be declared on, *in hæc verba*, or according to its legal effect; the plaintiff's interest in the subject of insurance; the payment of the premium; the inception of the risk; the performance of any precedent condition or warranty contained in the policy, and the loss, or happening of the event, on which within the terms and meaning of the policy the liability of the insurer attaches, must be alleged. 2 Green. Ev. § 376. The general rule applicable to all executory contracts is, that if the defendant's performance depended upon a condition precedent, the plaintiff must aver the fulfilment of such condition, whether it is affirmative or negative, or to be performed or observed by him, or the defendant, or a mere stranger to the contract, or must show an excuse for non-performance. If non-performance is excused, the matter of excuse must be distinctly averred. 1 Chit. Pl. 320–26. These rules of pleading at common law have been modified, and to some extent abrogated by the statutory provisions to which we have referred. The schedule of forms attached to the third part of the Code has the form of a complaint on a policy of marine insurance. R. C. p. 676. It is very brief, and is a simple statement that the plaintiff claims of the defendant the value of certain goods, not describing them, which the defendant on a certain day insured against loss or injury, against perils of the sea, and other

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perils in the policy mentioned, from a certain port to another, on board a certain vessel, which goods were lost by the shipwreck of the vessel on her voyage, of which the defendant had notice. This is a bare statement of a legal conclusion, not of facts from which the court on an inspection of the pleading could draw the conclusion that the plaintiff had a just cause of action against the defendant. There is also a form of complaint (R. C. p. 675) on a dependent covenant or agreement. It is a mere allegation that the plaintiff's cause of action is the breach of a covenant or agreement entered into, on a certain day, the substance of which is to be stated, followed by the general statement, that although the plaintiff has complied with all its provisions on his part, the defendant has failed to comply with the terms or stipulations forming the breach, of which complaint is made. These forms have the force of law. *Crimm v. Crawford*, 29 Ala. 623. They will support a judgment by default, as if every fact essential to the plaintiff's right of recovery was formally averred. *Randolph v. Sharpe*, 42 Ala. 265; *Letondal v. Huguenin*, 26 Ala. 552; *Pickens v. Oliver*, 29 Ala. 528; *Pike v. Elliott*, 36 Ala. 69.

We shall not inquire whether the complaint, if tested by the rules of pleading at common law, would be subject to the causes of demurrer interposed. For if it is conceded that under these rules the plaintiffs should have set out the application for insurance, and averred the truth of its statements, the necessity of the averment is dispensed with by these statutory enactments. Whether the statements in the application are to be regarded as conditions precedent or warranties, it was not necessary for the plaintiff to notice them. A mere statement of the contract or policy, followed by the general averment that the plaintiffs had complied with all its provisions on their part, and that the defendant had not in a specified matter performed it, is sufficient. In defence, the defendant may set up the non-performance of any condition precedent, or the breach of any warranty, on which his liability depends, and it will be as available as if it appeared on the face of the complaint. The complaint is certainly in substantial conformity to the analogous forms prescribed by the Code, and is therefore sufficient.

Nor was the complaint demurrable, because, according to its averments, the policy was void for uncertainty. The uncertainty is supposed to lie in the designation of the beneficiaries by the general term of "*Children of John Wilson Bledsoe.*" In deeds and in devises, the donee or devisee is frequently described merely by his relation to another, and a gift or devise to children has never been supposed to want any element of certainty. In policies of life insurance, the beneficiaries are often designated by no other term than that of children of the

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person whose life is assured, and their rights have been enforced. Bliss on Life Ins. 530-35. There was no variance between the complaint and the policy offered in evidence. "Children of John Wilson Bledsoe," and "The children of John Wilson Bledsoe," embrace the same persons, and no others, and are but different modes of designating the same class.

Several of the exceptions resolve themselves into a single point. The complaint avers the plaintiffs have performed all the conditions on which their right of recovery depends. The proposition in the circuit court was, under this averment, to make proof of an excuse for the non-payment of an annual premium, on the payment of which the continuance of the policy and the liability of the company depended. The court, against the objection of the appellant, admitted the evidence. As we have already declared, if the plaintiffs had followed strictly the analogous form of complaint prescribed by the Code, it would have been sufficient for them to state that their claim was founded on a policy of insurance of a certain date, issued on the life of John Wilson Bledsoe, by which the defendant promised to pay to them a certain sum on his death, and that he died prior to the institution of suit, of which the defendant had notice. All other allegations are rendered unnecessary. If the liability of the insurer has not attached, whether from a default of the plaintiffs, or from any other cause, it is matter of defence, which may be presented by plea. Apart from this view the policy became a binding contract on the payment of the first cash premium, and although it is declared that it is made upon condition that it is to cease and determine in the event of a failure to pay the annual premiums as they become due, a breach of this condition is matter of defence, the burden of proving which rests on the insurer. It was not necessary, therefore, for the plaintiff to have averred a performance of this condition, or an excuse for its non-performance. 1 Bigelow's Life & Accident Ins. Rep. 218. When, therefore, it was urged as matter of defence that the policy was forfeited, or had, in its own words, ceased and determined by the failure to pay, as it was due, the annual premium; matter of excuse for the failure was properly admissible.

It is apparent the policy was obtained by a father on his own life for the benefit of his infant children. The policy was issued and accepted on the expectation that he would pay the premiums. The beneficiaries had a right to adopt the contract, pay the premiums, and keep the policy alive; yet, it was not the expectation or the intention of the real contracting parties that they would do so. The duty of making the payment devolved on the father. After the annual premium had become due, and default had been made in its payment, the father, in

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the course of settlement of accounts with a former partner, charged himself with moneys collected on partnership debts, and declared he had made the collections to pay the premium, but did not pay because he had been informed by the secretary of the company the policy had been cancelled. To the introduction of these declarations in evidence the appellant objected, but the objection was overruled. The evidence is *hearsay*, in its most objectionable and dangerous form, and consists of exculpatory declarations, made by a party in the absence and without the knowledge of his adversary who is to be affected by them. A party's acts or declarations are never admissible as evidence for him, unless they constitute part of the *res gestæ*. The specific fact it was proposed to prove was, that the declarant was in readiness to pay, but had been prevented from making the payment of the premium by the act of the company. The time of payment had passed nearly a month before these declarations were made. Whatever, if any act was done, preventing the payment, must have been at or before the day of payment. It was therefore antecedent to these declarations. The *res gestæ* includes only facts, circumstances, or declarations attending the main fact, springing out of it, and contemporaneous with it. It is true they need not be exactly coincident in point of time with the main fact, but they must be so near it as to bear the relation of unpremeditated result to it. These declarations are wanting in this element of nearness, did not spring out of, or have any connection with the main fact, but grew out of a different transaction with a mere stranger, and are merely narrative of the main fact and the circumstances attending it. *Nelson v. Iverson*, 17 Ala. 216; *McBride v. Thompson*, 8 Ala. 650; *Gandy v. Humphries*, 35 Ala. 617. Hearsay is excluded not only because it generally presupposes the existence of better evidence, nor because of its intrinsic weakness and incompetency to satisfy the mind, but because of the frauds which could be practised under its cover. 1 Green. Ev. § 99; *Glover v. Millings*, 2 St. & Port. 28. A like reason obtains for the exclusion of a party's own declarations or acts when offered as evidence for him. If a party could by his own acts and declarations, made in the absence of the other party, manufacture evidence to excuse his non-performance, there could not be many contracts capable of enforcement. The widest door to fraud would be opened. Parties would find themselves stripped of their rights by the mere declarations of their adversaries in interest, of which they had not knowledge until offered in evidence against them. There was manifest error in the admission of the evidence of the witness Coleman; it should have been excluded.

The evidence of the witness Daniel, that Dr. Bledsoe spoke

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of the fact that the premium was becoming due, and of the source from which he expected to obtain money to pay it, and of his proposition to loan him the money to make the payment, was also inadmissible. It is subject to the objection that it is nothing more than the declarations of a party offered as evidence in his favor, capable of being manufactured to meet his own delinquencies. The evidence of this witness as to Dr. Bledsoe's ability to make the payment would be admissible in connection with legal evidence of an excuse for the non-payment.

In answer to a letter from the father, asking an extension of the time of payment of the premium, the secretary of the company replied stating that the policy had been cancelled on the books of the company, because no payment had ever been made to the company on it, and requesting him, if the premium had been paid to a deceased agent of the company, to send them a certified copy of the receipt for the payment, and to state when and to whom it was paid, as no premium had been sent them, and they had no record of the payment. These letters having been given in evidence, connected with evidence of the fact that the cash premium had been paid to a deceased agent of the company, the appellant proposed proving that it had never received this premium, was ignorant of its payment, and of the delivery of the policy. The evidence was rejected. The payment to the agent, his authority to receive it not being disputed, was a payment to the company, rendering the policy obligatory as a contract. The cancellation by the company did not affect its validity, or impair the rights of the assured, or of the beneficiaries. They could, by paying or offering to pay the premiums as they became due, have kept it alive, as completely as if the cancellation had not been made. The cancellation was a mere error, which, if not accepted by the assured as a rescission of the contract, could not prejudice either party. The appellant should have been permitted to prove the error in which it originated, and thus have relieved itself from any imputation of an intentional abandonment of the contract, with knowledge that the assured had performed his part, and was relying on it as valid.

The report and decree of insolvency of the estate of the assured, had in the court of probate, was properly excluded. The effect of the report and decree is simply to declare the *status* or condition of the estate, as between the personal representative and the creditors. They alone are parties to it, capable of contesting the facts on which it is founded, having interests affected by it, or in any wise concluded by it as a judicial proceeding. As to all other persons, it is *res inter alios acta*, and not evidence of the insolvency of the decedent,

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or of any other fact involved in it. *McGuire v. Shelby*, 20 Ala. 456; *State Bank v. Ellis*, 80 Ala. 478.

When this policy was issued, the statutes of this State required foreign insurance companies, transacting business here, to procure a certificate of authority from the comptroller. This certificate could be issued only on the filing of a certain statement, and paying a certain sum to the Fire Department Association and Medical College of Mobile. Any person violating the statute was declared guilty of a misdemeanor, and subject on conviction to fine and imprisonment. R. C. §§ 1180-91. To show the illegality of the policy, the appellant proposed proving its failure to observe the statute. That the contract of insurance was made here does not seem to have been a disputed fact. The company may have violated the statute, and the agents making the contract may have been liable to the penalty imposed; but neither the assured nor the beneficiaries were involved in, or affected by their guilt. While it is a settled principle, that a contract founded on an act prohibited by statute is void; yet it is subject to this qualification, that although the legislature may forbid the doing of a particular act, a party not privy to it, or involved in the guilt of the transaction, may recover of the guilty actor unless the act itself is void. *Whetstone v. Br. Bank Montgomery*, 9 Ala. 875.

The statute did not declare void the policy or contract of insurance made here, by a foreign company, without a certificate of authority. Its purpose was not to absolve the company from liability on its contracts made here. The object was to afford our own citizens ample security against loss, because of transactions had here with the companies. The company and its agents are alone guilty under the statute, if they violate it. Such violation they cannot invoke as a protection from liability on their contracts. There was no error in excluding the evidence offered to show its want of statutory authority to transact business.

The policy, by its terms, is forfeitable, is to cease and determine and the insurer to be freed from all liability, if the annual premiums were not paid when they became due and payable. The continuance of the policy as a contract—its life—depended on the prompt payment of the premiums. The payment was manifestly the condition precedent, on which the parties respectively stipulated for its continuance, and on the non-performance of which they assented to its extinction. *Howell v. Knickerbocker Life Ins. Co.* 2 Big. Life & Acc. Ins. Rep. 132; *Robert v. N. E. Mut. Life Ins. Co.* Ib. 141. It is an elementary principle, that the performance of conditions precedent may be waived, or, if the party, whose responsibility is to

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arise on their performance, by any act of his prevents performance, the opposite party is excused from a strict compliance. He must, however, prevent performance — he must be the proximate, not the remote cause — the *causa causans*, not the *causa sine qua non*. 2 Chit. on Con. 1087. The charge given on the request of the appellee, and the first and second charges requested by the appellant, which were refused, present the same question. The charge given and the charges requested are the converse of each other. That question is, whether the cancellation of the policy by appellant on its books, in ignorance of the fact that the cash premium had been paid, on the payment of which the policy became operative, and the letter of appellant's secretary informing the assured of it, written in response to the application of the assured for an indulgence, or extension of the time for payment of the premium, can be regarded as preventing the assured from making payment, or as excusing him from the duty of paying on the day fixed, if he would continue the policy.

The plaintiffs' action proceeds on the hypothesis that the policy was a binding contract, conferring on them rights, and fixing on the defendant liabilities, which they claim to enforce. If the policy was such a contract, it needs no argument to support the proposition, that it was not in the power of the company to rescind this contract, or by its own act or omission to absolve itself from the liabilities it imposes. The cancellation of the policy on its books was nugatory — impairing no right of the assured, and diminishing no liability it had assumed. As it required the assent of the assured to make the contract, so his assent was necessary to its rescission or renunciation. May on Ins. 567. The policy — which is now the foundation of the action, which is the highest and best evidence of the rights of the assured, and of the liabilities of the insurer — remained unaltered, without a blur or mark on it, exciting suspicion, or requiring explanation, in the possession of the assured, unaffected by this cancellation. The existence of the policy on the books of the company was merely evidence to it of the number and extent of its risks. It was no more than the entry on a merchant's books of his bills payable, or other debts. The cancellation or erasure of such an entry could work no injury to those having debts against him. How then could the cancellation, which was impotent to harm the assured, and impotent of benefit to the insurer, have prevented the assured from performing the condition on which the continuance of the contract depended? If the assured desired to keep the policy alive, it should have quickened his diligence in the performance of the condition. It may have indicated a purpose on the part of the insurer to renounce the contract,

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but such renunciation was not within its power, without the assent of the assured. It could not impede or hinder the assured from making the payment or offer to make it, at the appointed time, and thus keep the policy alive. If he had made the offer, the cancellation would not have justified its rejection. The policy would have continued a contract as binding on the insurer as if the cancellation on the books of the company had not been made. It is not material he was not informed of the cancellation until a few days before the premium was payable. The fact itself is immaterial, and of consequence, the time the assured acquired knowledge of it cannot be important.

There is nothing in the letter of the secretary indicating that the company would not receive the annual premium, if it was tendered when it became payable. It states the cancellation of the policy was made because no payment had been made upon it to the company, and requests, if the payment was made to a deceased agent of the company, that a certified copy of the receipt be sent them, with a statement of the time, manner, and person to whom it was made. The evidence thus requested was necessary to enable it to recover from the agent or his representatives, if payment had been made to him; and it was proper it should be furnished the company, to satisfy it of the fairness of the contract the company supposed had never been completed. The request indicates rather a purpose to continue the contract, if it was fair, and it was complied with by the assured, than a purpose unlawfully and without cause to renounce it.

Whenever a party has been excused from the performance of a condition precedent, because of the act of the party to whom performance is due, the act relied on has invariably been of a character that rendered performance impossible; or induced the belief that it was waived; or that if it was offered it would not be accepted. An act not of this character cannot be regarded as preventing performance, as the proximate cause of non-performance. From the evidence no such act is imputable to the appellant, and the non-payment of the premium is without excuse. It is a breach of a condition on which the continuance of the policy depended. The court erred in the charge given on request of the appellees, and in the refusal of the first and second charges requested by the appellant. It is not necessary to notice the remaining assignment of errors, as what we have said will probably enable the court on another trial to dispose of the case correctly.

The judgment is reversed and the cause remanded.

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Marshall *et al.* v. Croom *et al.**Creditors' Bill to set aside Fraudulent Conveyances.*

1. *Sworn answer ; effect of as evidence.* — When the answer is verified as required by the bill, it operates, so far as responsive, as evidence for the defendant, and must prevail unless disproved by two witnesses, or by one witness with corroborating circumstances.

2. *Fraud, badges of.* — A sale and conveyance to a blood relative ; the smallness of the price paid ; the dominion or control exercised over the property sold, and the like, are badges of fraud, but not conclusive proof of it, and may be explained.

3. *Same ; vendee's participation in, necessary to vitiate conveyance.* — Fraudulent acts or intent on the part of the vendor, not participated in, or known to, the vendee, will not authorize a decree setting aside the deed as one made with intent to hinder, delay, or defraud creditors.

APPEAL from Sumter Chancery Court.

Heard before Hon. A. W. DILLARD.

This was a bill filed by appellees, as judgment creditors of M. A. Marshall, to set aside three conveyances of lands made by him, two of which were made to his daughter, Mrs. Croom (now Mrs. Gere), and one to his son, J. B. Marshall. The grantor and all of the grantees were made defendants, and it was charged that the conveyances were without consideration, and made to hinder, delay, and defraud the creditors of the grantor. The defendants were not relieved from the necessity of putting in sworn answers, and each therefore answered under oath. The answers admit that at the time the conveyances were made the grantor was largely indebted, but it is alleged very positively and in detail that the grantees, respectively, were purchasers for value, and they deny any intent on their part to hinder or delay creditors ; and they aver that the sums paid were the full marketable value of the tracts respectively, and that the purchases were made fairly and openly, after the grantor had offered the places for sale to others. They also admit that the grantor is the father of the grantees ; and that he resides on the same place and in the same room as before the sale ; but they aver that the grantor, being old and infirm, resides with the daughter, at her request, as she can thereby the better care for and support him, and that he has no control whatever over the place. It was also admitted by the answers that suits were pending against the grantor, and that the conveyances were made just before the Spring term of the court, at which judgments were taken against the grantor.

The cause was submitted on the bill and answers, and a transcript, referred to in the opinion of the court.

A decree was rendered by the court below, declaring the conveyances null and void, and ordering a sale of the property

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for the payment of the debts of complainants, from which decree defendants appeal.

SMITH & COBBS, for appellants. — The transcript of the Reavis transaction did not affect the grantor's co-defendants. 1 Greenleaf on Ev. § 189; 20 Ala. 200; 30 Ala. 366; 10 Ala. 359; 8 Ala. 650. Complainants have made defendants their own witnesses; they cannot therefore discredit them or ignore their statements. 21 Ala. 359; *Crawford v. Kirksey*, June term, 1872. The relationship of the parties; the insolvency of the grantor; the suits pending, or that courts were on the eve of being held, although indications of fraud, are not conclusive proof of it; there is a full explanation of these, and a complete denial of fraud by defendants. 49 Ala. 539. The answer of a defendant under oath can only be overturned by the testimony of two witnesses, or of one witness coupled with corroborating circumstances. 36 Ala. 175; 1 Brickell's Dig. p. 738, § 1466. A *bona fide* sale and conveyance for an adequate price is valid, though the effect would be to hinder and delay creditors. 39 Ala. 60. The vendor's fraud and intent is not sufficient to avoid a conveyance; the vendee must be implicated. 48 N. Y. 130; 36 Ala. 642; 41 Ala. 245; 35 Ala. 483; 52 N. Y. 274.

SNEDECOR & COCKRELL, *contra*. — In considering the question of fraud *vel non*, a large latitude is allowed in the proof. 25 Ala. 161; Kerr on Fraud, 384-5. If the facts admitted establish fraud, they must be held to outweigh the denials of the defendants. 3 Paige, 557; Kerr on Fraud, 389; 4 Ala. 374; 8 Greenleaf, 373; 3 Humph. 179; 6 J. J. Marsh. 98. The transactions being between parent and child, show fraud. Kerr on Fraud, 179-181; 199-200; 4 Johns. 582; Roberts on Fraud. Con. 452. The change of property must be accompanied by change of possession. 16 Ala. 86; 1 Johns. Ch. 478; 1 Smith's Leading Cases, 34; Kerr on Fraud, 209; 1 Cranch, 310; 14 B. Munroe, 529.

It is admitted that defendant M. A. Marshall was in debt at the times of these conveyances. See Kerr on Fraud, 205.

JUDGE, J. — This bill was filed by the complainants, as a creditors' bill, to set aside certain deeds of conveyance of property made by Matthew A. Marshall to two of his children, Mrs. Gere, formerly Mrs. Croom, and James B. Marshall, on the alleged ground that they were severally made to hinder, delay, and defraud the creditors of the said Matthew.

On the submission of the cause for a final decree, no evidence was introduced by the complainants but "the bill, answers, and

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the transcript filed." The defendants offered no testimony. The transcript was a copy of original entries in the book of accounts of the late Judge Reavis, showing a settlement of accounts had by him with defendant Matthew A. Marshall, in April, 1866.

Whether this transcript, which was introduced in evidence by consent of the defendants, with the reservation of the right to make objections to its competency and relevancy, can be regarded as proof sufficient to show that the cause was not submitted for a decree on the bill and answers without evidence, we need not determine, as the view we take of the case will make the result the same whether it was thus or otherwise submitted. But as to whether it was a hearing on bill and answers without testimony, see *White's Heirs v. The President, &c. of the Florence Bridge Co.* 4 Ala. 464.

The charges of fraud made in the bill are direct and specific; and the interrogatories founded thereon for a discovery are of a thorough and most searching character. All the charges of fraud, and the interrogatories propounded to each defendant, are fully answered, and each one denies all the allegations imputing fraud; and the answers are strictly responsive.

It has long been the settled law of this State, that if a bill charges fraud, and the answer denies it, the answer, if uncontradicted, is conclusive evidence for the defendant. *Smith v. Rogers*, 1 Stewart & Porter, 317; *Br. Bank Huntsville v. Marshall*, 4 Ala. 60. The rule announced in these decisions, however, is not confined in its operation to charges of fraud alone. In all cases in our system of equity jurisprudence where the answer is verified in obedience to the requirement of the bill, it operates, so far as responsive, as evidence for the defendant, and must prevail unless disproved by two witnesses, or by one witness with corroborating circumstances. 1 Brickell's Dig. 738, and cases cited in section 1466. In the language of Judge Story: "It is an invariable rule in equity, that where the defendant in express terms negatives the allegations of the bill, and the evidence is only of one person affirming as a witness what has been so negatived, the court will neither make a decree nor send the case to be tried at law, but will simply dismiss the bill. The reason upon which the rule stands is this. The plaintiff calls upon the defendant to answer an allegation of fact, which he makes; and thereby he admits the answer to be evidence of that fact. If it is testimony, it is equal to the testimony of any other witness; and as the plaintiff cannot prevail unless the balance of proof is in his favor, he must either have two witnesses, or some circumstances in

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addition to a single witness, in order to turn the balance." 2 Story's Eq. Jur. § 1528.

It is certainly true that the answers in the case before us disclose facts and circumstances connected with the conveyances attacked, which are, in contemplation of law, badges of fraud; but they are not proof sufficiently conclusive of it to overturn the sworn denials of the answers; especially when the complainants have made the answers their own testimony.

The transcript showing a settlement between Judge Reavis and M. W. Marshall, in April, 1866, tends to show that the latter was not indebted to the former, at the close of the late war, in as large a sum as he had stated it to be in his answer to the sixth interrogatory propounded to him in the bill. In the present aspect of the case, this contradiction can be of no material import. The co-defendants and vendees of M. W. Marshall were not parties to the transaction, are not shown to have had any knowledge of it at any time, and cannot be affected by it.

It follows from what we have said, that the decree of the chancellor granting the relief prayed for by the complainants was erroneous; and the decree must be reversed and the cause remanded.¹

King v. Mitchell.

Action on Promissory Note.

1. *Action on promissory note; what evidence inadmissible.* — In an action on a promissory note, the issue being whether the plaintiff had agreed to receive eight per cent. Confederate bonds in payment, she cannot be permitted to prove by a witness who was her debtor during the war that he did not offer to pay because he knew that she refused to receive Confederate money. Such evidence is irrelevant, and calculated to mislead the jury.

2. *Same; what evidence inadmissible.* — On such an issue proof that the plaintiff during the war refused to accept payment of a large debt in Confederate money from a debtor who came from a distance, and proof of declarations by her "that she would not accept Confederate money or bonds in payment of debts due her," — the defendant not being present, or in any way connected therewith, is merely proof of her own acts and declarations in her own favor, irrelevant to the issue, and wholly inadmissible against the defendant.

APPEAL from Dallas Circuit Court.

Tried before Hon. MILTON J. SAFFOLD.

The opinion states the case.

PETTUS, DAWSON & TILLMAN, for appellant.

¹ This case was decided at the January term, 1875.

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MORGAN & LAPSLEY, *contra*.

JUDGE, J. — The principal controversy in the court below between the parties to this suit was, whether the note sued on had been paid. The note, together with others, had been left by the appellee, who was plaintiff below, with one P. J. Weaver for safe keeping. Subsequently one N. Waller, who was the general agent and book-keeper of Weaver, received of defendant in payment of the note Confederate States bonds, and delivered the note to the defendant. There was conflict in the evidence as to whether Waller had any authority from the plaintiff to receive Confederate bonds in payment of the note.

One Nicholl, a witness for the plaintiff, testified that he owed the plaintiff at the beginning of the late war the amount of a promissory note for the sum of nine hundred dollars; and that he did not propose or offer to pay the note during the war, "because the witness knew that plaintiff refused to accept Confederate money." That portion of the answer of the witness giving the reason why he had not proposed or offered to pay the note, during the time mentioned, was objected to by the defendant as being illegal and irrelevant evidence; but the court overruled the objection, and permitted the evidence to go to the jury; and in this the court erred.

The note which was due by the witness to the plaintiff, and the reason of the witness for not offering to pay it during the war, had no proper relevancy to the case on trial. Furthermore, the principal point in dispute was not whether the plaintiff during the war refused to receive Confederate *treasury notes* generally, but whether she had not *specially* agreed to receive Confederate eight per cent. bonds in payment of the note sued on. The evidence objected to was not only irrelevant but calculated to mislead, and should have been excluded from the jury.

The plaintiff was then permitted to prove by the same witness, against the objection of the defendant, that he had heard the plaintiff declare frequently, during the war, "that she would not accept Confederate money or bonds in payment of debts due her," and the same witness was further permitted to testify, also against defendant's objection, that during the war a gentleman came from Mississippi to pay the plaintiff a large debt with Confederate money, but that plaintiff refused to take it in payment of the debt.

These were acts and declarations of the plaintiff in her own favor, with which the defendant had no connection, and they were not properly relevant to the issue; and we know of no

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rule under which they could have been properly admitted in evidence against the defendant.

Let the judgment be reversed and the cause remanded.

Plowman v. Thornton.

Summary Proceeding under the Statute to compel the Delivery of Books and Papers.

1. *Summary proceeding to compel delivery of property of public office; when order should not be made.* — The relator is not entitled to an order under the statutes to compel the delivery to him of the books and property of a public office, unless he exhibits a clear *prima facie* title to it, free from all reasonable doubt.

2. *Same; what clear prima facie title.* — A commission from the governor issued on a certificate of election, or a certificate disclosing a vacancy in office made by an officer having authority to certify it, whether the certificate be true or false, confers a clear *prima facie* title to the office entitling the person commissioned after due qualification to enter upon the discharge of the duties of the office, and to have the custody of the property pertaining to it.

3. *Same.* — The *prima facie* title thus acquired is conclusive until the ultimate right to the office is determined on *quo warranto*, or information in the nature of *quo warranto*. No inquiry as to the truth or falsity of the certificate, upon which the commission is based, can be entertained in any mere collateral proceeding.

4. *Same; when certificate of vacancy is a nullity.* — Where, however, the certificate of vacancy discloses facts, which, legally construed, show that no vacancy exists in the office, the certificate destroys itself and affords no support to a commission based on it. Such a commission is without force for any purpose, and does not confer even a *prima facie* right to the office.

5. *Constitutional Convention of 1867; powers of.* — The powers of the Constitutional Convention of 1867, held under the "Reconstruction Acts" of Congress, were special and limited, and it had not legislative power; but in the power conferred was embraced authority to adopt an ordinance putting in operation the governmental agencies it established in the Constitution, and so organizing them that when the government came into existence, it would continue without an interregnum of power or officers in all its departments.

6. *Ordinance No. 32; validity of.* — Ordinance No. 32 of that Convention, providing that the officers first elected under the Constitution should hold their offices for the term prescribed, and until their successors were elected and qualified, was a valid exercise of this power. The approval by a judicial officer, who was one of the first elected under the Constitution, of an official bond after the election, but before the qualification of his successor, is, in all respects, valid and binding.

THIS was a summary proceeding commenced by the appellee, W. H. Thornton, before the judge of the 10th judicial circuit (Hon. JOHN HENDERSON), to compel appellant, George P. Plowman, to deliver up to appellee, as his duly qualified successor, the books and papers pertaining to the office of probate judge of Talladega county, which it was alleged appellant had vacated by failing to file his official bond, properly approved, as required by law. The appellant, on the hearing before the circuit judge, moved to quash the complaint, and reserved numerous exceptions which need not be further noticed.

The evidence shows that Plowman had been duly elected probate judge at the general election held November 3, 1874,

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qualified, commissioned, and had given bond in all respects, as required by law, if his bond filed in the office of the secretary of state was properly approved. The appellee having introduced his commission from the governor, dated January 13, 1875, and proof of qualification, filing bonds, &c., the appellant introduced in evidence a duly certified copy of the certificate of the secretary of state, upon which the governor issued the commission to Thornton. This certificate was as follows:—

“OFFICE OF THE SECRETARY OF STATE,

“Montgomery, Jan'y 9th, 1875.

“To His Excellency, GEORGE S. HOUSTON,

“Governor of Alabama:

“SIR,—In compliance with section 164 of the Revised Code of Alabama, I hereby certify to your Excellency the failure of George P. Plowman, who was elected (according to the returns of the election held on the 3d day of November, 1874, on file in this office) to the office of judge of probate for the county of Talladega, to file his bond as probate judge properly approved by any one of the officers designated by the act of August 31st, 1868.

“The bond is herewith submitted purporting to have been approved by B. F. SAFFOLD, justice of the supreme court of Alabama, on the 9th day of November, 1874, whose term of office, according to the opinion of the attorney general of the State, had expired previous to the approval of said bond.

“Very respectfully, your ob't s'y't,

“R. K. BOYD, *Secretary of State.*”

The bond thus referred to in the certificate was in due form and penalty, and approved by Hon. B. F. SAFFOLD, a justice of the supreme court, on the 9th day of November, 1874. On it was an indorsement of the secretary of state (Hon. N. H. Rice), showing that it had been filed and recorded in that office on the following day. It was also shown that the Honorables R. C. BRICKELL, THOMAS J. JUDGE, and A. R. MANNING, who were elected judges of the supreme court, at the election held on the 3d of November, 1874, were not commissioned, and did not qualify until the 18th day of that month.

There was evidence in the record showing that Judge SAFFOLD was one of the first judges elected under the Constitution, and that ever since the 13th day of July, 1868, he had been recognized by the people and all the departments of the state government, as supreme court judge, up to the time his successor qualified.

The circuit judge made the statutory order to compel the delivery of the books and property, and the appellant, not having made the oath required by law, was ordered to be com-

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mitted to jail until he made the delivery. Plowman appealed, and now assigns this order, among other things, as error.

RICE, JONES & WILEY, for appellant. — Under our statutes, the issuing of a commission where a vacancy has been certified to the governor is purely ministerial. In appointing the particular individual, the governor may exercise political power; but he has no option to appoint or not. The certificate of vacancy makes it his duty to appoint some one. The law pointing out the mode and manner in which the appointment to fill a vacancy *must* be made, no appointment can be made unless those modes have been followed. There must at least be a *proper certificate* by a proper officer, to authorize an appointment to fill a vacancy, whether the vacancy be true or false. The *proper certificate* of vacancy is the *jurisdictional* fact; without it the governor's commission is mere waste paper. Where the certificate of vacancy discloses facts which show that there is no vacancy in the office, it becomes a mere nullity, incapable of conferring rights. 3 West Va. 70; *Hartt v. Harvey*, 32 Barbour, 61; 43 Pa. 372. There is no foundation whatever in law for the opinion that a bond approved by Judge SAFFOLD was invalid. He was most certainly a *de facto* officer. *Heath's Case*, 36 Ala.; 37 Maine, 423; 56 Pa. State; 4 Iredell, 135; *Mayor v. Stoneum*, 2 Ala.; *Thrower v. State*, at last term; *Ex parte Strang*, 21 Ohio, 610; *State v. Carroll*, 38 Connecticut, 449. The ordinance of the convention was valid. It simply provided for keeping the machinery of government in motion — to prevent a *hiatus*. *State v. Spence*, 7 Ala. 500; *Magruder v. Swan*, 25 Maryland, 215. What becomes of this court if appellee's theory of the Constitution is correct? The effect to be accorded the commission of the governor depends on the power he exercises in making it. If the original power to appoint and remove at will rest in him, — in other words, if he is the *sovereign* as to such appointments, — then his commission is entitled to the weight which some of the decisions cited by appellee declare should be accorded to it. As to such appointments the governor is the *sovereign*; as to others, his issue of a commission is a mere ministerial act, — based on facts, the evidence and existence of which the law ascertains and provides in a definite mode, — and no more force can be accorded it than any *other* ministerial act. If there is no certificate of vacancy, there can be no appointment. The governor has no discretion whatever as to the ascertainment of the vacancy. The law does that for him. His commissioning a person to fill the vacancy is a purely *ministerial* act. This distinction reconciles all the cases.

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TAUL BRADFORD and JOHN T. HEFLIN, for appellant. — The governor's commission is *prima facie* evidence of title to the office, and in cases of this sort conclusive. Leading Cases on Elections, Brightly, 314-20; *Ex parte Harris*, *Ex parte Thompson*, *Bebee v. Robinson*, all at last term. The governor exercises political power in granting these commissions, and his action cannot be controlled or collaterally impeached by the judiciary. *State v. Governor*, 1 Dutcher N. J. 348. His commission is "resistless" except in action of *quo warranto*, and this is from grave reasons of public policy. The secretary of state's certificate is in proper form. The statement about the bond filed and approved is mere surplusage. The certificate is merely cumulative evidence. The commission is the highest evidence, and any decision subjecting it to collateral attack is to be deprecated.

Judge SAFFOLD'S term having expired on the 13th July, 1868, he no longer had the *reputation* of being such judge, and ceased to be *de facto* judge. *Parker v. Kitt*, 1 Ld. Raymond; *Briggs v. State*, 3 Iredell, 358; 4 Iredell, 361.

The ordinance, § 4 (Acts, 68, p. 181), provides that the return of the election for state and county officers shall be made to the president of the convention, who shall give certificates of election to the persons elected, which was never done. The act of Congress only provides for one election after the convention assembles; this election is confined solely to the ratification of the Constitution; and this act requires the returns to be made to the commanding general of the district. Act of Congress of March 23, '67; supplemental to act of March 2, '67, section 4.

"The 5th section of the act of Congress of March 2, '67, provides simply for a constitutional convention, and contains no specific delegation of the power to, or limitation of the powers of such convention. The act of Congress of March 23, '67, provides that the convention 'shall proceed to frame a Constitution and civil government according to the provisions of this act, and the act to which it is supplementary,' and the Constitution when framed shall be submitted by the commanding general to a vote of the registered voters for ratification or rejection, and the returns of the election are required to be made to the commanding general. The 3d section of the act of Congress of June 25, '68, 'to admit the state to representation in Congress,' provides that after ratification of the fourteenth amendment the State shall be admitted to representation in Congress; and further, 'that thereupon the officers of each State duly elected and qualified under the Constitution thereof, shall be inaugurated without delay.' Vide section 3, act June 25, '68; vol. 15 U. S. Statutes at Large, page 74.

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"These provisions of the Reconstruction Laws, and the act to restore the State to the Union, show that the officers referred to in the 3d section of the act of June 25, '68, are officers to be elected under the Constitution after the passage of this act, and not to those supposed to be elected under the election ordinance at the election commencing February 4, '68. The act of June 25, '68, is prospective in its operation, and is not retrospective or retroactive. The reconstruction laws do not confer power on the convention to adopt the election ordinance. And a constitutional convention does not possess legislative power. Vide Jameson's Constitutional Convention, §§ 415 to 418; §§ 479 to 520. Cooley's Constitutional Limitations, 3d edition, page 30 to 32, and note 1, page 32."

The convention had no power to pass the election ordinance No. 32, and especially is the power defective in adopting the ordinance with provisions in conflict with the Constitution. *Wells v. Baine et al.* 75 Pa. State Rep. 25 (P. F. Smith, vol. 25); *Wood's Appeal*, vol. 75 Pa. State Rep. (vol. 25 P. F. Smith) page 59.

BRICKELL, C. J.—1. This proceeding was commenced by the appellee, claiming to be the successor of the appellant, as judge of probate of Talladega county, under the 6th article, part 1, title 5, chapter 1, of the Revised Code, to compel the delivery of the books, papers, money, and property of the office, which it is alleged the appellant unlawfully withholds. At the present term, in the case of *Thompson v. Holt*, we decided that the proceeding could not be supported unless the relator exhibited a *prima facie* title to the office, free from all reasonable doubt; that a title founded on a commission from the governor issuing on a certificate of election, or a certificate disclosing a vacancy in the office, made by the officer having authority to certify it, until vacated by a judicial determination in a proper proceeding, was a *prima facie* title, free from all reasonable doubt.

2. The first inquiry presented by the proceeding is the right of the relator to the custody of the property of the office, and that right is incidental to the title to the office. The facts in reference to the title disclosed in the record are, that the appellant was at the last general election duly and constitutionally elected judge of probate of the county of Talladega. On the 9th day of November, 1874, six days after his election, he gave an official bond as such judge, with security, which on that day was approved by Hon. B. F. SAFFOLD, as associate justice of the supreme court. The bond so approved was on the next day filed in the office of the secretary of state, and the appellant having taken the oath of office required by law, was by

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the governor duly commissioned, and entered on the discharge of his official duties. On the 9th of January, 1875, the secretary of state certified to the governor that the appellant had failed to file an official bond, properly approved. He appends to the certificate the bond which was filed, and states that according to the opinion of the attorney general, Judge SAFFOLD's official term had expired before its approval. On this certificate, the governor on the 13th January, 1875, appointed and commissioned the appellee as judge of probate of Talladega county, to fill the vacancy supposed to have been created by the failure of appellant to file an official bond, properly approved.

The statute requires a probate judge, before entering on the duties of his office, to give bond with security, to be approved by a judge of the supreme court, or of the circuit court, or a chancellor. R. C. § 784. Such bond must be filed in the office of the secretary of state. R. C. § 785. On the reception of such bond, properly approved, it is the duty of the governor to forward him a commission. Pamph. Acts 1872-73, p. 29, § 55. A failure to file an official bond operates a vacation of the office, and it is the duty of the officer in whose office such bond is required to be filed at once to certify such failure to the appointing power, and the vacancy must be filled as in other cases. R. C. § 164. The officer with whom an official bond is required to be filed cannot file the same unless the approval of the proper officer is indorsed thereon. R. C. § 165. The approval of an official bond must be in writing indorsed thereon, and must show the time of approval, and be signed by the approving officer. R. C. § 158.

Under the statutes we have no doubt that, on the certificate of the secretary of state that a probate judge elect or appointed has failed to file an official bond, properly approved, within the time prescribed by law, it is the duty of the governor by appointment to fill the vacancy shown by the certificate to exist in the office. Such appointment being made, the appointee is entitled, when he shall have qualified according to law, to enter on the duties of the office, and no inquiry into the truth or falsity of the certificate can be made, except on *quo warranto*, or a proceeding in the nature of *quo warranto*. If this certificate had affirmed nothing more than the fact of the failure to file an official bond, and the consequent vacation of the office by the appellant, it would have been indisputable in this proceeding. That is not, however, its character. It recites the fact that the appellant had, within the time allowed by law, filed an official bond, which is appended, and rests the declaration of a failure to file such bond on the fact that, in the opinion of the attorney general, Judge

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SAFFOLD, because of the expiration of his term of office, had no authority to approve it. It states the facts as they appeared from the files of the secretary's office, and submits to the governor, and the courts if the matter should be litigated, whether appellant had filed an official bond properly approved. We are not at liberty to reject as surplusage, or unauthorized, this recital of facts. It was eminently proper the secretary should have stated them, and not assumed to determine the question of law involved. It was proper also for the governor, in view of the opinion expressed by the law officer of the State, to make an appointment to fill the vacancy in the office, which, if that opinion is correct, certainly existed. If, however, Judge SAFFOLD's term of office had not expired when he approved the bond, the certificate destroys itself. So far from disclosing the failure of appellant to file an official bond, it discloses the fact that such bond was filed, properly approved, in the time prescribed by law. *Hartt v. Harvey*, 32 Barb. 55; *Ewing v. Thompson*, 43 Penn. 372.

3. The several acts of Congress, known as the "Reconstruction Acts," adopted respectively on the 2d March, 1867, the 23d March, 1867, and the 19th July, 1867, declared that no legal government existed in this State; that the government then in existence was to be deemed provisional merely, and if continued, was to be continued subject in all respects to the military commander of the district, and to the paramount authority of Congress. In order that a state government, capable of recognition by the federal government, should be formed, it was provided that to the registered voters should be submitted the election of delegates to a convention, for the purpose of "establishing a Constitution and civil government;" and at the same election the voters should determine whether such convention should be held. If a majority did not vote for such convention, it was not to be held. An election was had, and a majority having voted for a convention, it was held, and framed the present Constitution of the State. The convention was authorized and required to submit the Constitution for ratification to a vote of the registered voters. If a majority of them voted for its ratification, a copy of it was, by the president of the convention, to be transmitted to the President of the United States, who was required to transmit it to Congress. If it was approved by Congress, the State was to be declared entitled to representation in Congress. The Constitution was submitted to the registered voters for ratification; and an election for state and county officers, and for members of Congress, had at the same time, in February, 1868. On the 25th June, 1868, the State was by Congress admitted to representation, and the Constitution approved, on condition that the

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legislature ratified the fourteenth amendment to the Constitution of the United States; and should further assent, that the Constitution should never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote, who were entitled to vote by the Constitution as it was then framed, except as a punishment for such crimes as were then felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of the State. U. S. Stat. at Large, 15 vol. 73.

4. The manifest purpose of the Reconstruction Acts was the organization and establishment of a government in the State, in harmony with the prevailing policy of the general government, and which they could recognize as *republican in form*. The expediency of the acts, and their adaptation to this end, was never a judicial question; and their constitutionality has long since passed beyond the domain of judicial controversy and decision. A Constitution was formed; a government organized and established, which the general government recognized; and to which for more than seven years the people have yielded obedience in all its departments, legislative, executive, and judicial. A judge deriving his authority and jurisdiction from the Constitution formed under these laws cannot enter into an inquiry and discussion of their validity.

5. In determining the power and duty of the convention, which was on a vote of the registered voters to be held under these acts of Congress, we must bear in mind the purpose to be accomplished. It was not only the formation of a Constitution, but the organization and establishment of a state government. The convention was required to submit the Constitution it framed to the registered voters for ratification. The mode of doing this was left to the convention. The convention, having been called on a vote of the registered voters, assembled and framed a Constitution. An ordinance was then adopted submitting the Constitution thus framed to the registered voters for ratification, and providing for an election at the same time of representatives in Congress, members of the general assembly, and state and county officers. The ordinance further provided, that the officers elected at this election should hold office for the term prescribed by the Constitution, beginning from the day of the next general election after the admission of the State into the Union, and until the election and qualification of their successors. Pamph. Acts 1868, p. 180, Ordinance, No. 32. The ordinance makes provision for the election of a chief justice and two associate justices of the supreme court, chancellors, and circuit judges. By the Constitution, judges of the supreme court are elected by the qualified electors of the State, and hold office for the term of

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six years. At the election held under this ordinance in February, 1868, Judge SAFFOLD was elected associate justice of the supreme court. After the Congress had approved the Constitution, and admitted the State to representation, and after the general assembly had ratified the fourteenth amendment to the Constitution of the United States, he was qualified and entered on the discharge of his official duties, continuing therein until the qualification of his successor, on the 19th November, 1874. The first general election in the State after its admission into the Union, as it is expressed in the ordinance, or as expressed in the acts of Congress, after its admission to representation, was on the first Tuesday in November, 1868. The validity of the provision of the ordinance, so far as it declares that the official term of the officers elected under it should begin "from the day of the next general election after the admission of the State into the Union, and continue until their successors are elected and qualified," is denied; and it is insisted Judge SAFFOLD's term of office begun and expired either six years from the day of his election in February, 1868, or from the day of his qualification in July, 1868. It is said the authority of the convention was special, and was limited to the formation of a Constitution; that the ordinance is legislative, beyond the power of the convention, and offends the provisions of the Constitution, by extending official terms beyond the term it prescribes. There would be more force in the proposition if a government had been in existence in the State — a government recognized by Congress as "*republican in form*," and capable of protecting life, liberty, and property" — a government with power to inaugurate its successor, and which could of itself have assembled a convention to form a Constitution, prescribed its powers, and reserved a revisory power over its action. Such a government the acts of Congress expressly declare was not existing. The government existing in the light of these acts was mere matter of fact, not of law, and was subject to the paramount authority of the military commander of the district, and to be changed, abolished, or superseded at the will of Congress. The military commander could under these acts, so far as he deemed necessary and proper, use its agencies to execute the powers with which he was intrusted. The displacement of this government, from which not only recognition was withheld, but which was shorn of all power except such as the military commander permitted it to exercise, by a government which the Congress would recognize, was the end proposed to be accomplished. A convention might assemble and form a Constitution, but the Constitution it ordained was without force, until it had received congressional approval. It was that approval alone which could

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give it vitality and obligation. When approved, the approval would not organize and put in operation the government the Constitution ordained. Subsequent legislation by Congress, organizing and putting it in operation, is not contemplated. The provisional government was declared not legal, existing merely as matter of fact, and was without capacity to organize and put in operation the legal government which was to displace it entirely. On the convention therefore, in the very nature of things, it seems to us the duty of providing for the organization and establishment of the government the Constitution ordained devolved. It could not devolve on the legislature, for none could assemble until the Constitution became operative, and when it did assemble, it would be without power so to arrange the terms of officers that an interregnum would not occur. The terms as fixed by the Constitution would be beyond their control. It was impossible to foresee when Congress would admit the State to representation, or on what conditions, and, of consequence, when the constitutional term of office would begin and terminate. Without this ordinance, the terms of officers, if commencing on the day of their election or qualification, and continuing only for the constitutional term, would have left the State without a judicial department from February or July, 1874, to the succeeding November, when a general election would be held. If the official term had commenced, and been computed from the election in February, 1868, more than five months of the constitutional term would have elapsed, before the officers could have entered into and exercised the duties of their offices; so that they would have been deprived of a part of the term of office assigned by the Constitution. The ordinance was indispensable to the organization of the government, and to its successful operation, without intermission of its authority, after it had come into existence. If it had been inserted in the body of the Constitution, its validity would not have been questioned. It is temporary in its character and operation, and seems to us more properly the subject of an ordinance than of incorporation in the body of the Constitution, in which only permanent and enduring provisions should be found. It cannot be regarded as in conflict with the constitutional provisions as to terms of office. These provisions and the ordinance are to be construed together. When thus construed they are harmonious,—the ordinance applying only to the officers elected under it, fixing their terms, and as to them qualifying the provisions of the Constitution, while the constitutional provisions are of full force as to officers subsequently elected. The provisions of the ordinance, temporary in purpose and effect,—designed only to put in operation, and keep in operation without inter-

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mission of official power the government the Constitution ordained, — finds a precedent in the history of nearly every constitutional convention. The object is sometimes accomplished by a schedule appended to the Constitution, and sometimes by an ordinance. The form is not material; the power of the convention to accomplish the object existing, much must be left to their discretion as to the form in which it will be accomplished.

We assent fully to the proposition that the power of the convention was special and limited, and that it had not legislative power. But within this special and limited power was embraced the power of adopting an ordinance putting in operation the governmental agencies which it established in the Constitution, and so organizing them that when the government came into existence, it would continue without an interregnum, or an intermission of officers and power, in all its departments. In the very words of the acts of Congress, the power of the convention was “establishing a Constitution and civil government.” The ordinance continued Judge SAFFOLD’s official term and authority until the election and qualification of his successor, which, not having occurred until the 19th November, 1874, he had authority to approve appellant’s official bond. The certificate of the secretary of state disclosing the filing of the bond so approved, shows there was no vacancy in the office of probate judge to be filled by executive appointment. The appointment of appellee appears, therefore, to be void. It is not a *prima facie* title to the office. It is without force for any purpose.

The order of the circuit judge must therefore be reversed and annulled, and a judgment here rendered dismissing the complaint at the costs of the appellee in this court, and before the circuit judge.

MANNING, J. — I concur in the conclusions announced by the chief justice, without expressing any opinion in respect to the legal obligation or constitutional validity of the acts of Congress known as “the Reconstruction Laws.”

The government and Constitution which were thereby set up in this State have been recognized and obeyed as such for a period of seven years, and still are. The acts of those who were put in power under this Constitution in 1868, whether they were officers *de jure* or only officers *de facto* exercising a usurped authority, are legally effectual. This is required by the necessities of society. And I have no doubt that the ordinance of the convention adopted to put the government and Constitution referred to in operation, and extending the terms of those then put into office until their successors should be

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qualified, is as valid as the Constitution framed by the same convention. According to this ordinance, Judge SAFFOLD continued to be in office as one of the judges of the supreme court to a day later than that on which he approved the bond of appellant as judge of probate for Talladega county. The bond, therefore, is not void.

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Unlawful Detainer.

1. *Evidence of heirship; what competent.* — In unlawful detainer by the heirs against one who entered under a lease from the administrator, they may introduce the record of his final settlement, on which they were represented as heirs, to prove heirship.

2. *Charge to jury; what erroneous.* — Where there is no evidence of a particular fact the court may so instruct the jury, but such a charge should rarely if ever be given without hypothesis. The giving of a charge that "there is no sufficient proof" of a particular fact will not be upheld when all the evidence is not set out and there is nothing to show that the charge was not an invasion of the province of the jury.

APPEAL from Circuit Court of Baldwin.

Tried before Hon. JOHN ELLIOT.

The points decided are sufficiently stated in the opinion.

GIBBONS & PRICE, for appellant. — Lipscomb, though not a party, is a privy to the judgment, rendered on Hall's settlement. It was competent evidence to prove heirship as against him.

D. C. ANDERSON and ALEX. MCKINSTRY, *contra*. — Lipscomb could not have appeared or contested the heirship of plaintiffs on Hall's settlement. He is not privy to the judgment, nor bound by its recital of facts as to who the heirs were. 17 Ala. 681; 25 Ala. 161; 15 Ala. 609.

JUDGE, J. — This was an action of unlawful detainer instituted against the appellee by persons claiming to be the heirs at law of Antoine Lalonette, deceased.

One Gerald B. Hall had been appointed by the probate court of Baldwin county administrator of the estate of said Lalonette, and as such administrator had leased the premises sued for, as the property of the estate, to the defendant, for the year 1872.

Afterwards the said Hall made, in the probate court of Baldwin county, a final settlement of his administration of the estate, and was discharged therefrom.

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The plaintiffs below were represented on that settlement as the heirs-at-law of the intestate, and decrees were made in their favor as such heirs, against the administrator.

On the trial of this cause the plaintiffs offered in evidence a transcript of the records of the probate court of Baldwin county, showing the appointment and settlement of said Hall as administrator of the estate, for the purpose of proving by the recitals of the record that they were the heirs-at-law of the intestate. On the objection of the defendant this evidence was excluded by the court as being incompetent for that purpose.

1. It is certainly true that, except as between parties and privies, a record is not evidence of the facts recited in it. The defendant rented from, and held under Hall, as the administrator of the estate, and was consequently a *privy in estate* with Hall as such administrator; and being such privy, the recitals in the record of Hall's settlement as to the heirship of the plaintiffs are evidence against the defendant to the same extent that they would be, in a proper case, against Hall himself. The court therefore erred in excluding the transcript as evidence.

2. A power of attorney — but the record does not show when, to whom, by whom, nor for what purpose, executed — was also offered in evidence by the plaintiffs, to prove by the recitals therein that they were the heirs-at-law of the said Antoine Lalonette, deceased. This evidence was objected to by the defendant, and properly excluded by the court.

3. The court, at the request of the defendant, gave to the jury the following charges: —

"1. That there is no sufficient proof before the court and jury that the parties claiming the possession in this case are the heirs of Lalonette."

"2. Although there were proof that the plaintiffs in the summons and complaint are the heirs of Lalonette, yet in that case they are not entitled to recover in this action."

If all the evidence introduced on the trial had been set out in the record, and it appeared therefrom that there was *no evidence* in the cause showing, or tending to show, that the plaintiffs were the heirs-at-law of the deceased, Lalonette, we might hold that there was no error in the giving of the charge first above stated. In the language of DARGAN, C. J., in *Knox v. Fair* (17 Ala. 503), "when there is no evidence tending to prove a particular fact, the court may so instruct the jury, whether the evidence be oral or written." But we think such a charge should rarely, if ever, be given without hypothesis. The language of the charge in question implies that there was *some* proof of the fact of the heirship of the plaintiffs, by the

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statement that it was not *sufficient*. There is nothing in the record to prevent the conclusion that this charge was a clear invasion of the province of the jury; the court therefore erred in giving it.

4. We cannot impute error to the court in giving the second charge. In the absence of the contrary appearing, we must presume that there was evidence to justify it. *Possession* being a necessary element of the case of the plaintiff, in every such action as the present, to the exclusion of all consideration of the question of *title*, it may be that this charge was predicated upon the idea, that the heir of the lessor, upon whom the law casts the ancestor's right, would not be entitled to maintain the action without he had been actually possessed of the premises. But upon this question we will express no opinion, as it is not directly presented by the record. *Devine v. Brown*, 35 Ala. 596; *McKeen v. Nelms*, 9 Ala. 507.

For the errors we have named let the judgment of nonsuit be set aside, and the cause remanded.

Dudley v. Abner.

Trover for Conversion of a Mare.

1. *Conditional sale; what is, and how affects bonâ fide purchaser.* — Where the owner delivers a mare to another to keep and work her, with the understanding "that the mare is to belong to the owner until the price is paid, when the owner is to give a receipt or bill of sale," the transaction constitutes a conditional sale, void as against *bonâ fide* purchasers without reference to the registration laws. (MANNING, J., held the transaction should be viewed in the light of a *parol chattel mortgage*, and that it was void as to *bonâ fide* purchasers and creditors of the vendee under the influence of sections 1561-2 of the Revised Code.)

2. *Trover; what acts of plaintiff do not estop him from bringing.* — Where the plaintiff, an illiterate negro, acting upon the advice of the defendant and another person of influence and standing, delivered up property to defendant, who claimed to hold a mortgage on it, this does not estop him from bringing *trover* against the defendant for the conversion, if it turns out that the property is not subject to the claim asserted.

3. *Bonâ fide purchaser; what constitutes.* — A *bonâ fide* purchaser, in respect to a person who has an undisclosed lien or claim upon the property, is one who buys it for a valuable consideration without notice of such claim or lien; and he is a purchaser for a valuable consideration notwithstanding he may have taken advantage of, or cheated, his immediate vendor by misrepresenting the value of the thing with which the purchase was made. This fraud, if there was no collusion between these two against the person holding the claim or lien, cannot be set up by the latter.

APPEAL from Circuit Court of Lowndes.

Tried before Hon. JAMES Q. SMITH.

Abner brought *trover* against Dudley for the conversion of a mare.

In the years 1870 and 1871 Dudley was cultivating a plantation, and among his tenants had one Abram Webb. Dud-
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ley, then owner of the mare in controversy, delivered her to Webb, "with the contract and understanding that Webb was to work the mare in his crops, but she was to be Dudley's until paid for, and when paid for she was to belong to Webb, to whom Dudley was then to give a receipt or bill of sale for the mare." The price to be paid is not stated in the bill of exceptions. In 1871 Abner, the appellee, exchanged his mule with Abram Webb for the mare and took her home. At that time Webb owed fifty dollars on the price, after allowing him all credits, but he did not then know that the mare was not fully paid for. In the following June, Dudley learned of the exchange. He and another white man, one Harrel, took the mule to Abner, a negro, and Dudley informed him that the mare had not been paid for, and that he had a lien or mortgage on her and had come to demand her. Abner was reluctant to part with the mare, but on being told by Harrel that if Dudley had the mortgage or lien it was his duty to give her up, he put a bridle on the mare and delivered her to Dudley, who rode her off.

Dudley left in place of the mare the mule which had been exchanged for her, and was then broken down, both being in bad order, and also a colt she had while in Abner's possession, saying to Abner "that the mare was enough to make him [Dudley] whole." At the time of the trial, Webb, to whom Dudley delivered the mare when he got her from Abner, was using her, and the mule was dead.

The defendant offered testimony to show that while Abner was trading with Webb and making the swap, "he represented the mule as a good work mule, and further said that the mule had broken up all of plaintiff's land. He further offered to prove by Harrell and Webb that the mule was not a good work animal; that it would not work, and was the worst work mule the witnesses had ever seen." The court refused these offers, and defendant excepted.

The defendant requested three written charges, each of which the court refused, and to each of which refusals the defendant excepted. The first of these charges directed the jury that if they believed that the mare was sold to Webb under the circumstances above shown, "and if when the exchange was made \$50 was due on her, and that within a reasonable time afterwards Dudley obtained the mare peaceably and without any breach of the peace, the plaintiff could not recover." The second charge was the same as the first, except that it directed the jury not to find for the plaintiff unless the evidence convinced them that he acquired the mare in fair trade and in good faith." The third charge asserted in substance that if Dudley regained possession of the mare in the manner above

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set forth, without any breach of the peace, he was not guilty of a conversion.

The exclusion of the evidence offered, and the refusals to give the charges requested, are now assigned as error.

STONE & CLOPTON, for appellant. — Dudley's right to recover of Webb cannot be disputed. Abner obtained all his rights from Webb, and must fail if he is not an innocent purchaser for value, &c. The testimony excluded showed fraud, overreaching, in the very transaction by which Abner claims title. It negatived the *bona fides* of the purchase. A contract tainted with fraud of any species, or any violation of a statute, cannot ripen into a *bona fide* purchase. *Saltmarsh v. Tuthill*, 13 Ala. 390; 16 Wendell, 575.

In *Sumner v. Woods*, last term, it was held that the purchaser under such circumstances must *show* that he was *bona fide* purchaser. That burden is not on the former owner. If that case is adhered to, the refusal to give the second charge was error. The maxim "*Volenti non fit injuria*" clearly applies and justifies the third charge requested. The present case, however, is not the case of a *mortgage* or the like. It comes within the principles of a loan of property. § 1564 Rev. Code. Dudley's title was in no peril until three years elapsed. 21 Ala. 119.

CLEMENTS & ENOCHS, *contra*. — The proffered evidence to show that Abner cheated Webb was properly excluded in this suit, however proper it might have been in an action between Webb and Abner. *Smith, Wykoff & Nichols v. Jones*, 29 Ala. 283. Dudley's possession was *tortious*. The court will look to all the circumstances attending the taking by Dudley. 48 Ala. 75. The plaintiff never *consented* to the taking.

MANNING, J. — The appellant in this cause bought the mare in controversy, in the early part of the year 1870, and delivered her to Abram Webb, a colored man (tenant of premises which Dudley had leased to him), upon an agreement that Abram should keep and work the mare, and pay a certain price for her; upon payment of which price Dudley was to give to Abram a receipt or bill of sale of the mare, but retain the title to her until that time in himself. How much Abram was to pay for the mare does not appear. But Dudley, who testifies (as another witness also does) that the mare was in a low condition when he took her from Abner, the appellee, says further, she was then worth \$100; while Abner testifies she was then worth \$150. We must infer, therefore, that the price of her, between Dudley and Abram, was fixed at a sum exceeding \$100.

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Dudley further testifies that the proceeds retained or received by him, of Abram's crop of 1870, paid all the rent Abram owed him for land, and the money due for advances, and the price of the mare, except fifty dollars. No account is stated showing this result; nor was Abram made aware until June, 1871, that the mare was not fully paid for. In March of that year Abram traded her to appellee, Abner; who in this cause sued Dudley in trover for the mare, he having got possession of her, and obtained a judgment below for damages.

The question is, should this judgment be reversed?

Was there or not a sale of the mare from Dudley to Abram? Suppose that, without any fault of the latter, the mare had died instead of being exchanged to Abner for a mule: would Dudley have been liable to Abner for so much of the price as Abner had paid to him? If not, it would seem to be because the mare belonged to Abram. If the mare had died as supposed, would not Abram have been bound to pay the balance of the price to Dudley? If yea, it would again appear to be because the property in her, a qualified property at least, had passed to Abram. True, Dudley still had an interest in the mare, — perhaps retained the legal title. But what was the nature of the contract between them?

A transaction similar to that between Dudley and Abram Webb, was brought before this court in *Weaver v. Lapsley*, 42 Ala. 601. On the 1st of February, 1865, just before the close of the late war, Lapsley sold two slaves, of which he had a mortgage with power of sale, to Weaver, and took Weaver's note for them for \$2,030⁰⁰ payable at a future day, and delivered the slaves and a writing to Weaver, which writing contained these words: "In accordance with the agreement now hereby made with the said L. G. Weaver, proper titles for said negro girls, under said mortgage and sale, will be made, and I bind myself to make the same to Mrs. Margaret Le Grand Weaver, wife of said Le Roy G. Weaver, on the payment of said note; until which payment the title to remain in me."

The war having ended, and the negro girls being set free, before the note was paid, Weaver insisted that the sale was not complete, that it was conditional, and that he was discharged from payment of the note, because, upon its being paid, Lapsley could not give "proper titles" to the slaves. The case was argued by counsel of great ability more than once. And the court said: "The contract between the parties was not a stipulation to sell at a future day, but was an absolute sale accompanied by a delivery of the property, — with a stipulation that the purchase-money should be paid at a future day, and that on its payment the vendor should make 'proper

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titles' to the wife of the vendee. We cannot hold such a contract to be *conditional* sale. If the retention of the title by the plaintiff had any effect, it was simply to give him a security for the payment of the purchase-money, in the nature of a mortgage. . . . There is a striking analogy between a contract like the one we are considering, and a contract for the sale of realty, where the vendor executes his bond conditioned to make titles on the payment of the purchase-money. In the latter case, a court of equity considers the contract as being a conveyance to the purchaser, and a reconveyance back by way of mortgage to secure the payment of the purchase-money." And as a conveyance of personal property can be made without writing, this court held that a court of law must put the same interpretation upon the transaction it had under consideration.

The only difference between this case and the one now in hand, in the view we are taking of them, is, that in the former the contract was in writing, and in the present one it is not. But this difference does not affect the validity or construction of the contract. No right of a third person, however, came up for consideration in *Weaver v. Lapsley*.

The case of *Wait v. Green* (36 N. Y. Rep. 556), decided in 1867, was this: Catherine Comins sold and delivered a horse to one Billington, and took his note for \$100, at five months, for the price; and under the note and on the same piece of paper was this memorandum, signed by Billington: "Given for one bay horse. The said Mrs. Comins holds the said horse as her property until the above note is paid." Billington afterwards sold the horse for value to a purchaser without notice, against whom, after demand, a suit was brought for the recovery of the horse.

The court of appeals of New York were unanimous in opinion, and said: "Let it be conceded that the sale and delivery was conditional, that the agreement was that the horse should remain the property of Mrs. Comins until paid for, and that the plaintiff succeeded to all her rights, and that the defendant was a *bonâ fide* purchaser from Billington; and the authorities are full to the effect that the defendant will be protected in his title. When chattels are thus sold and delivered conditionally, the vendor's right to the property remains good as against the vendee and his voluntary assignee, and others who purchase with knowledge of the condition, but not as against *bonâ fide* purchasers from the vendee."

About two years after this another similar case came before the same court of appeals of New York, and (two judges dissenting) was decided differently. This was *Ballard et al. v. Burgett*, 40 N. Y. R. 314.

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Plaintiffs in October, 1865, sold a yoke of oxen to one France for \$180, and put them into his possession under an agreement that the oxen were to remain the property of the plaintiffs until paid for. Without having paid for them, France, in April, 1866, sold and delivered the oxen to defendant, who purchased without any notice of plaintiff's claim. The court, two judges dissenting, decided that plaintiffs were entitled to recover. GROVER, J., in delivering the opinion of the court, referred to the case of *Wait v. Green, supra*, and after stating the facts of it, as we have above stated them, says: "The fair intention from the above facts is, I think, that Mrs. Comins intended to sell and deliver the horse to Billington, and transfer the title to him, and take back from him security for the payment of the note, in the nature of a chattel mortgage, upon the horse. It is clear that had the horse died without the fault of Billington before the payment of the note, such death would have been no defence to the action on the note. The horse was at the risk of Billington. This is a *strong if not conclusive* circumstance, showing the correctness of the above construction of the facts. Not so in the case at bar. Had the oxen died without the fault of France, no action could have been sustained by the plaintiffs for the purchase-money. That, in no event, could be recovered, unless the plaintiffs were able to give France a title to the oxen, — unless their ability so to do had been prevented by France."

The decision in this case of *Ballard v. Burgett*, predicated on this reasoning, is an authority in favor of Abner in the cause now in hand; for we suppose no one will doubt that if the mare sold by Dudley to Abram Webb had died before Abram traded her to Abner, without the fault of Abram, Dudley would have insisted that the loss must fall upon Abram. And according to the reasoning of Judge GROVER, the transaction between Dudley and Abram was a sale, with the reservation of a lien in the nature of a parol chattel mortgage.

A similar view of the rights of the parties upon the termination of a conditional contract of sale seems to have been taken by the supreme court of Michigan (CHRISTIANCY, J., delivering the opinion) in *Preston v. Whitney* (23 Mich. 267), in which it was held that the conditional purchaser who had paid several instalments of the price, and then failed to pay subsequent ones, was, on the termination of the contract and taking back by the defendant of the article sold, entitled to recover the instalments previously paid.

Upon the same idea, that if the property which is the subject of a conditional sale be destroyed or perish without fault of the party having possession of it, the loss must fall upon him who has the title, the defence was predicated in the important

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case of *Weaver v. Lapsley, supra*; and this idea, not controverted as unsound in law, was obviated by the court's showing that the contract under consideration was not that of a conditional sale. It is not intended, however, to insist that the proposition involving that idea is good in all cases of conditional sales. But it must be obvious that troublesome questions may arise in such cases, especially if one of the features of them should be that the conditional seller has taken back the property for non-payment of the price in whole or in part, or the property so sold shall perish or be destroyed before being paid for, without the fault of the conditional purchaser.

If we hold that there has been a sale, and the title to the article remains in the seller merely for his security as title is vested in a mortgagee, there is no difficulty in determining what the rights of the parties are. But if we hold that it is a conditional sale, that no property in the thing is passed to the person in possession of it, that there is no change in the title, but the thing continues to be his who had the title to it, and is to remain his until the performance of some condition upon which a change of property is to take place; then if the thing perishes or is destroyed before the performance of that condition without the fault of the party in possession, the logical result would seem to be that he must bear the loss to whom the thing belonged. To avoid that result, a contract must be implied on the part of the person in possession, in the nature of a contract of insurance, that the thing shall not be destroyed before performance of the condition.

If, again, it is a case of conditional sale, and the owner of the article, for failure to pay the price, take it away from the conditional vendee, what is to be done with it? Does the contract become void, and has he a right to dispose of the article as he chooses? If so, it would seem that his only claim against the conditional vendee would be for hire for his use of the article; *Preston v. Whitney, supra*; or perhaps an action on the case for damages.

But what if this vendee has made partial payments of a large part of the purchase-money; shall the vendor pay these back or sell the article to pay the residue? or shall he keep it or sell the entire property in it as his own? If he must sell it to pay the balance of the price, upon what notice shall he do so; by what rules of law are his duties and obligations prescribed, and the rights of the vendee protected? If we consider the parties as bearing towards each other the relation of mortgagor and mortgagee, there is no difficulty in the solution of these questions. But if it be a case of "conditional sale," or "conditional contract of sale," they may prove to be embarrassing and require legislative action.

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Whatever name, however, we give to the transaction, according to the decision of this court in *Sumner v. Wood* (at the January term, 1875), "such a contract cannot be set up to the prejudice of *bonâ fide* purchasers and creditors without notice."

Reference was made in that case to *Martin v. Mathiot* (14 Serg. & R. 214), in which a sheriff had levied an execution against one Michael, on horses and harness in his possession, but which was claimed by Martin, who brought suit for them against the sheriff. The decision of the court below was that "if vendor and vendee agree that the possession shall pass to the vendee, but the property remain in the vendor until the whole purchase-money is paid, such agreement, as respects creditors and the sheriff, is fraudulent," and this was brought up to the supreme court of Pennsylvania for revision.

TILGHMAN, C. J., said: "I cannot say that I see any error in the opinion of the court of common pleas. Possession of personal property is the great mark of ownership. It is almost the only index which the world in general has to look to. But there are exceptions. There are certain necessary and lawful contracts by which the owner parts with the possession, and yet fraud cannot be presumed. Such are the contracts of lending and hiring, both very useful, and without which society could not well exist. It is of the essence of these that the owner should give up the possession for a time. Such, too, are contracts by which an artisan or manufacturer has the possession of materials belonging to another for the purpose of making them up, or repairing them for the owner. No suspicion of fraud can fairly arise when the transaction is in the usual course of business. But the case is very different where it is intended that the property should be apparently in one, while it is in fact in another. This is out of the usual course of business, unnecessary, and directly tending to the injury of those who are not in the secret. In the present instance, for example, there was a sale of four horses and harness, and possession delivered to a man who got his living by the use of his team. All the world had a right to suppose that he was the owner of the horses which he drove; and a secret agreement to the contrary was an injury to society, by giving the wagoner a false credit, which might induce others to trust him with their property."

There are other cases besides those mentioned by C. J. TILGHMAN, in which title is allowed to be in one person and possession in another. These are cases of contracts that one person shall become the owner of an article upon condition that he pay or secure payment of the price of it to another, or upon some other like condition in contemplation or expecta-

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tion of the performance of which the article is sent to or taken by the intended purchaser, perhaps for examination, — at least without any intention that it shall become or be used as his, until he shall have performed the condition. Such contracts frequently arise and are very convenient in commercial dealings ; and within proper limits they are freely allowed. What these limits are it is not easy to define ; and hence it is not very surprising that in the numerous cases of supposed or real conditional sales, or conditional contracts of sale, some are found which are not reconcilable with one another, or with the rights of third persons in the articles which are the subjects of them.

Without reviewing the cases further, it seems to me it would be best, and would tend to the avoidance of embarrassing questions, to hold that when the owner of personal property delivers it to another to be used by the latter in his trade or business as his own, upon an agreement that at a future day he shall pay for it a stipulated price, and that until the payment is made the title to the property shall remain in the person who so delivers it, — and the nature of the transaction is such that if the article perish or be destroyed without the fault of the person who has possession and the use of it, yet he shall be liable for the agreed price to the other party, — this is not in strictness a conditional sale or contract to sell, but a sale for a price payable at a future day, with a reservation of the title for security, in the nature of a parol chattel mortgage, and such it seems to me was the transaction between the appellant in this cause and Abram Webb.

This case is not within the scope of sections 1564 or 1565 of the Revised Code. They embrace cases in which the chattel involved is the property of a third person, and in the possession of one not the owner upon a loan or hiring of it to him, or *temporarily* for some other reason, and in which the owner intends to resume the possession. And of these cases it may be said that such is the actual course of human transactions, and the disclosures naturally and undesignedly made respecting them, that if a person has property that is merely lent or hired to him, or that really belongs to another who intends to resume possession of it, it rarely happens that the fact does not become known to those who may be concerned to know it. And he, besides, would not be apt, by disposing of it as his own, to subject himself to the penalties of the criminal law. But the same publicity does not obtain of the existence of an unrecorded lien or property in possession of the owner or of a purchaser.

Most of the decisions declaring such contracts as that we are considering void, as against *bond fide* purchasers and creditors of the vendees, hold that they are so independently of any

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statute of registration, upon the imputed fraud in the tendency of such transactions to give false credit to persons in possession and to lure others into trusting them thereupon. This policy of the common law is fortified and enforced by sections 1561 and 1562 of the Revised Code; and these are to be liberally construed in support of the policy.

Prior to these provisions in the Code, there was a statute of 1828 which enacted that "All deeds and conveyances of personal property *in trust* to secure any debt or debts shall be recorded," &c., &c., "or the same shall be void against creditors and subsequent purchasers without notice." In *McGregor v. Hall* (3 Stew. & Port. 397), it was contended for a mortgagee, that this did not embrace mortgages; that these were different from deeds, or conveyances *in trust*. The court answered: "Mortgages are included within the meaning and intention of the legislature. The object of the act is to give notice to the world of the liens which are held on property, by persons out of possession, so as to prevent credit from being given to holders, on account of the possession of it. . . . It behooved the legislature to throw every guard around the honest members of the community that was possible, to protect them from the arts and combinations of the fraudulent. The act of 1828 was therefore passed. . . . Every reason which could have influenced the general assembly to provide that deeds of trust to secure debts should be registered, operates in an equal or greater degree in respect to mortgages."

Thus, as long ago as 1832, this court held that the statute established a salutary policy which should be upheld by a liberal interpretation of the laws on the subject. In 1863, with like views in respect to the provisions in the Code, it was held that they reached a mortgage made out of the State, by persons residing out of it, of personal property within the State. *Hardaway v. Semmes* (38 Ala. 657); and in *Brooks v. Ruff* (37 Ala. 371), speaking of parol unwritten mortgages of personal property, WALKER, C. J., said: "Such a mortgage would, by virtue of our registration statute, be void 'as to purchasers for a valuable consideration, mortgagees, and judgment creditors without notice' (Code, § 1288); but we think it would be valid as to parties and others not protected by the statute."

The case before us, although not within the terms of the sections of the Code above quoted, comes within the influence of the policy which they establish, for the protection of *bond fide* purchasers and creditors without notice: and Abner, as a *bond fide* purchaser, got a good title against Dudley. My colleagues hold that his transaction with Abram Webb was a conditional sale, and void as against Abner, a *bond fide* purchaser, without reference to registration laws.

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Considering the circumstances and the representations made by appellant and Mr. Harrell, both white men of considerable property and standing, under which the appellee, Abner, reluctantly allowed appellant to leave the mule, that was returned broken down, and take away the mare, the court below correctly ruled that this did not constitute a good defence. The maxim, *Volenti non fit injuria*, does not apply in such a case.

Appellant offered to prove that Abner falsely represented to Abram Webb that the mule was a first-rate work mule, and had broken up the land for his crop, and to prove further to the contrary, that the mule was one of the worst work mules known, whereby he had cheated and defrauded Abram of the mare, and was not a *bond fide* purchaser.

A *bond fide* purchaser in respect to a person who claims an undisclosed lien or property in an article subsequently sold, is one who, in the more accurate expression of our statute law, is a "purchaser for a valuable consideration without notice." Rev. Code, §§ 1558, 1559, 1561, 1562, 1563, 1566. And he is a purchaser for a valuable consideration who parts with something of value for the thing purchased. Whether in the transaction between him and his immediate vendor he gets the advantage of, or cheats the latter, by misrepresenting the qualities or value of the article he gives in exchange for the thing purchased, is a question which, if there be no collusion between those two against the person having such secret lien or property in it, the latter cannot raise. Hence, whether the mule was or not all Abner represented him to Abram to be, was a matter irrelevant in this controversy.

If Abram found that he had been overreached or defrauded, and intended to insist on a rescission, it was his duty to do so promptly, while the parties could be put in *statu quo*. If he did not choose to wage this contest, Dudley cannot do so in his stead.

The cases to which appellant's counsel refers us on this point are those in which contracts condemned were made by both parties in violation of laws that prohibited them from being made at all.

It is because of the great number and real importance of cases of the class to which the one before us belongs, that it has been considered at so much length.

The judgment is affirmed.

[Thompson v. Campbell.]

Thompson v. Campbell.

Motion to dismiss Appeal.

1. *Appeal from order for possession, &c.; in whose name must be taken.* — Where, at the instance of the purchaser at a sale of mortgaged property, under a decree of foreclosure, a writ of possession issues against a stranger in possession, he may appeal; but the appeal must be prosecuted against the purchaser alone.

2. *Defective appeal.* — Where the appeal bond misdescribes the decree from which the appeal is taken, or where there is no certificate of appeal, the appeal is defective. These defects are amendable under the Revised Code (§§ 4420-21), and the appellant will be allowed a reasonable time to perfect his appeal before it will be dismissed.

THIS was a motion to dismiss the appeal in this case, on grounds stated in the opinion.

BRICKELL, C. J. — A decree was rendered in favor of Campbell, the appellee, against Ann H. Smoot, foreclosing a mortgage made by her; a sale of the mortgaged premises directed, made, and confirmed. The appellee was the purchaser. At this stage of the proceedings the appellant, suing by her husband as next friend, intervened by petition, alleging she was the owner and in possession of the premises, and that the mortgagor was not the owner and had not possession when the mortgage was made, or since; and praying that no order touching the possession should be made without notice to her, and without an opportunity being afforded her to defend her possession. The appellee answered the petition, and moved that he be let into possession. A decree was finally rendered that the appellee be let into possession of the premises, and that the process necessary to put him in possession should issue if it was not surrendered. An appeal was allowed the appellant on her entering into bond with surety, to be approved by the register, conditioned to prosecute the appeal to effect: The record does not contain a certificate of appeal, and the bond for the appeal recites that it is taken from a decree rendered at the June term, 1874, against appellant and Ann H. Smoot.

In *Creighton v. P. & M. Bank* (3 Ala. 156), it is held that when on motion of a purchaser at a sale of mortgaged premises, under a decree of foreclosure, a writ of possession is directed to issue against the tenant in possession, an appeal from such order may be prosecuted by the tenant. It must be prosecuted against the purchaser alone. Neither the complainant or any other party to the foreclosure suit is a proper party to the appeal. The controversy is exclusively between the tenant and the purchaser. Under the authority of that decision, the appellant may prosecute an appeal from the decree, letting the ap-

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pellee as purchaser into possession. But Mrs. Smoot cannot be a party to such appeal. She is not a party to the decree from which the appeal is taken; nor is the appellant a party to the decree of foreclosure rendered against Mrs. Smoot. There is no decree in the record rendered jointly against appellant and Mrs. Smoot, and, of consequence, no such decree as that described in the appeal bond.

The appeal is irregular for the want of a certificate of appeal, and because the decree from which it is intended to appeal is misdescribed in the appeal bond. These irregularities are amendable under the statute. R. C. §§ 4420-21, p. 844. If the proper steps are not taken to amend them within twenty days, the motion to dismiss the appeal must be allowed.

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Qui Tam Action for improperly issuing Marriage License.

1. *Qui tam action against probate judge for improperly issuing marriage license; what complaint sufficient.* — In a *qui tam* action against a probate judge for improperly issuing a marriage license, the complaint is not demurrable because it fails to state the sex of the persons named in the license, or that a marriage was solemnized under it, or, in the case of a minor, that the parents or guardian resided in this State.

2. *Same.* — The defect, if it be one, of such complaint for failing to allege the residence of the female in the county in which the license issued, if not objected to below, is cured by verdict and judgment. Non-residence of the female in the county in which the marriage license issues, does not invalidate the license or render void the marriage solemnized under it.

3. *License; whose consent to necessary.* — Where the father has actual, rightful custody of the minor, he alone can consent to the issue of the license. Proof of acts of adultery on the part of the father during the subsistence of the marriage relation with the mother of the minor does not of itself forfeit the father's right to the custody and control of the child, so as to authorize the mother, contrary to his wishes, to give a valid consent to the issue of the license.

APPEAL from City Court of Montgomery.

Tried before Hon. JOHN D. CUNNINGHAM.

This was a *qui tam* action brought by Zach Gammel against George Ely, probate judge of Montgomery county, to recover the penalty given by statute for improperly issuing a marriage license authorizing the solemnization of the rites of matrimony between Robert Garvin and Emily Gammel. It is alleged in the complaint that said Emily was under eighteen years of age, and had not had a former husband, and that the license was issued without the consent of the parents or guardians, given either personally or in writing. The complaint also alleged Ely's qualification and authority as judge, &c., but did not state in what county either of the parties mentioned in the license lived.

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The complaint was demurred to, 1. Because the sex of the persons named in the license was not shown. 2d. Because it did not appear that any marriage was ever solemnized under it. 3d. Because it did not allege that said Emily had a parent or guardian residing in the State. The demurrer was overruled.

On the trial Zach Gammel, the plaintiff, and father of Emily, testified that on the day she was born he entered her birth in a family Bible, and introduced the Bible, the entry in which showed that said Emily was born on the 8th of May, 1857, and was not seventeen years of age on January 4, 1874, the day on which the license issued, and she married. He never gave his consent to the marriage or issue of the license. On cross-examination plaintiff testified that about two years prior to the trial he quit and abandoned his first wife, who was the mother of Emily, and who is still living, and when he abandoned her left Emily with her, and she remained there several months until plaintiff sent her to Georgia, where she remained four or five months, and then plaintiff put her to board with a Mrs. Burke. Emily had been with Mrs. Burke a short while when she left one evening and was married. A short time after this plaintiff obtained a divorce from the mother of Emily, and married his sister-in-law. Plaintiff bought the Bible about three years after his marriage in 1844, and had owned it many years when he recorded the birth of Emily. The counsel for defence then called witness' attention to the fact that the title-page to the Bible showed that it was printed long after 1857; whereupon he said he must be mistaken in some way about it. The defendant then introduced as a witness the mother of said Emily, and first wife of the plaintiff, who testified that some two years ago plaintiff abandoned witness and her daughter, and left them together; that before he abandoned her as well as afterwards, plaintiff several times visited the house of the widow of his deceased brother at late hours of the night, pulled off his clothes and went to bed with her, staying all night. This conduct was known to witness long before and at the time of the marriage of Emily. Witness gave her consent to the marriage, was present at the ceremony, and approved it. On motion of the plaintiff, the evidence of this witness as to the adultery on part of plaintiff and her consent to the marriage was excluded from the jury, and the defendant duly excepted.

The court charged the jury in substance that if Ely was probate judge and issued the license without the consent of the plaintiff, and that Emily was a female under eighteen years of age at the time, not having had a former husband, then the jury should find for the plaintiff, &c.

The action of the court in excluding the evidence and the charge excepted to are now assigned for error.

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RICE, JONES & WILEY, for appellant.

SANFORD & MOSES, *contra*.

JUDGE, J. — 1. The city court committed no error in overruling the demurrer to the complaint; for neither one of the grounds thereof assigned was well taken; and neither one is insisted upon by appellant in this court. We deem it unnecessary to notice them in detail.

2. But it is contended that the complaint will not support the judgment rendered, because it does not contain a substantial cause of action, in that it does not aver that the female named in the license resided in the county in which the license was issued; and section 2338 of the Revised Code is relied upon as authority for this position. That section provides that "no marriage shall be solemnized without a license to be issued by the judge of probate of the county in which the female resides," &c.; and by section 2342 of the Code, the judge of probate incurs a penalty of five hundred dollars for issuing a license to marry contrary to this or any other provision of the Code relating to that subject. We cannot therefore presume, at the instance of the judge of probate, that he improperly issued the license in this respect; nor can we agree with counsel for the appellant, that the residence of the female in the county in which the license is issued "is an essential jurisdictional fact without the existence of which the license, if issued, is a nullity." If improperly issued, the probate judge incurs a penalty for the act; but neither the license nor the marriage which may be solemnized thereunder is void.

If it be necessary to a good complaint in a case like the present, that it should contain an averment that the residence of the female was in the county in which the license was issued, the omission to make the averment could be taken advantage of by demurrer, and if the demurrer should be sustained, the defect might be cured by an amendment. But a trial on the merits, followed by a verdict and judgment in favor of the plaintiff, without objection on account of the omission, would cure the defect; and the complaint containing a substantial cause of action, the judgment would stand. Such is the aspect of the present case.

3. The right of a father to the custody and control of his infant female child, we admit, may, in a proper case, be forfeited by misconduct at the instance of the child, or at the instance of some one moving to that end in behalf of the child. But we are at a loss to perceive how the misconduct of the father, sought to be proved by his first wife in the present case, could operate as a justification to the probate judge for im-

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properly issuing the marriage license. The father seems to have bestowed upon his daughter proper care and attention, and he had the right to her custody and control, which right had never been forfeited; and his assent was necessary to the proper issue of the marriage license by the probate judge. The city court, therefore, committed no error in excluding the proposed evidence of the father's misconduct; it had no proper relevancy to the issue on trial, and the charge given by the court to the jury was also free from error.

The judgment of the city court is affirmed.

Robinson v. The State.

Indictment for Burglary.

1. *Jeopardy; when does not arise.* — No legal jeopardy arises on a trial under an indictment, which is so defective that no valid judgment of conviction can be rendered on it.

2. *Burglary; what indictment for, defective.* — An indictment under § 3625 R. C., for burglariously entering a gin-house in which "lint cotton" was kept for use, &c., is defective, if it fails to aver that the "lint cotton" was a valuable thing or of some value.

3. *Discharge of juror for sickness; practice as to.* — The court quotes with approval the language in *Barrett v. The State* (33 Ala. 406), as to the caution to be observed in discharging a juror after evidence given. Where a juror is discharged "on complaint of being sick," the record should show that the court ascertained the truth of that fact before discharging him.

APPEAL from Circuit Court of Lowndes.

Tried before Hon. J. Q. SMITH.

The appellant, Ike Robinson, was convicted of burglary. The indictment charged that before the finding thereof he "broke into and entered into the gin-house of William Robinson, in which gin-house was kept at the time lint and cotton for sale, use, and deposit, with the intent to steal," &c.

A jury was selected, and the defendant pleaded not guilty. A witness was being examined by the State, when "one of the jurors trying the case complained of being suddenly sick and unable to sit on the jury, and the court excused the juror from the panel against the objection of defendant, and defendant excepted." Another jury was formed consisting of the eleven remaining jurors, and another who took the place of the sick juror. "The defendant expressed satisfaction with the jury, and pleaded not guilty. The solicitor read the indictment to the jury, and the trial commenced anew. The defendant objected to going to trial, and moved for his discharge, but the court overruled the motion, and defendant excepted."

R. M. WILLIAMSON, for appellant, cited *Norris & Coleman v. The State*, in MS.; *Barrett v. State*, 35 Ala. 406.

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JOHN W. A. SANFORD, Attorney General, *contra*.

MANNING, J. — In this cause it is insisted that defendant was entitled to his discharge on the ground that he must not a second time be put in jeopardy.

In *Barrett v. The State* (35 Ala. 406), which was a case of the discharge of a jury trying the prisoner, after all the other business of the court had been disposed of, with a view to an adjournment of the court before the expiration of the term by law, and when the jury, after being some time out, had not been able to agree, this court said: "It is much the more prudent and safe course for the circuit judge to protract the session of the court to the end of the term prescribed by law, where the duration of the term is fixed, unless some great and overruling necessity requires a different course, or unless the prisoner consents to the discharge of the jury. For it is an extremely delicate and hazardous thing for the court to interfere with a prisoner's chances for life or liberty, by acting upon the apparent absence of any probability of an agreement by the jury."

This is an expression of the opinion of this court as to the importance of great care on the part of judges in matters of this sort.

In the case of *Ned v. The State* (7 Port. 187), in considering the causes for which a judge might legally discharge a jury, after evidence given, "the sudden illness of a juror, or of the prisoner, so that the trial cannot proceed," is mentioned as one.

In the cause in hand the record shows only that a juror "complained of being suddenly taken sick and unable to sit on the jury," and that without more, and against the objection of the defendant, he was excused, after evidence had been given, and that the cause was then withdrawn from the jury. And it is argued that if upon a mere complaint of sickness by the juror, without any inquiry by the court into the truth of the complaint, he may put an end to a pending trial, it would be in the power of an unfriendly and dishonest person, who might be sitting on the jury, to procure the discharge of that body, for the purpose of preventing an acquittal of the defendant, and thereby putting him again in jeopardy.

It would have been better if the record showed that the court below ascertained the sickness of the juror to be real, and such as that the trial could not proceed. But it is not necessary for us to decide whether the failure to do this was error or not, because the indictment upon which the defendant was put upon trial was so defective, that judgment thereupon could have been arrested, and he was not therefore legally in jeopardy.

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One of the errors here insisted upon by his counsel is, that the indictment is defective and insufficient in not showing that "lint cotton" — which was the only article alleged to have been in the gin-house that prisoner is charged with having burglariously entered with intent to steal — was a valuable thing, according to section 3695 of the Revised Code, under which the prosecution was instituted.

This precise point was made and sustained in *Norris & Coleman v. The State*, 50 Ala. 126. See also *Crawford v. The State*, 44 Ala. 382.

For the error in this particular the judgment of the circuit court is reversed, and the cause remanded.

Appellant will remain in custody until discharged by due course of law.

Stone et al. v. Knickerbocker Life Insurance Company et al.

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Creditors' Bill to subject Money due on Policies of Insurance.

1. *Multifariousness; who can raise objection on ground of.* — A bill may be multifarious as to one or more defendants without being so as to others, and only those defendants as to whom the bill is multifarious can avail themselves of an objection to it on that ground.

2. *Insurance on life of husband; how far statute protects.* — The statute authorizing insurance on the life of the husband for the wife's benefit, the premiums being paid by him, exempts from claims of creditors only so much insurance as is paid for by such premiums to the extent of five hundred dollars per annum. If the aggregate amount of annual premiums paid out of the husband's funds exceed five hundred dollars, the excess of insurance is liable for the payment of the husband's debts, without regard to the number of policies by which the insurance is effected.

3. *Multifariousness; what bill not demurrable for.* — A bill filed by creditors of the husband against the personal representative of the husband and wife, and their children and distributees, and also against two insurance companies, in each of which the husband's life was insured for the benefit of his wife and children, charging that he had paid therefor more than five hundred dollars annually out of his own funds, &c., and praying for an account, and that the excess of insurance paid for by annual premiums over five hundred dollars be decreed liable for the satisfaction of debts and distributed accordingly, is not multifarious.

APPEAL from Chancery Court of Mobile.

Heard before Hon. ADAM C. FELDER.

The appellants, who are simple contract creditors of W. B. Drake, who died intestate and insolvent, filed this bill, in behalf of themselves and other creditors, to subject to the satisfaction of their debts the sums due on two policies of insurance for \$10,000 each, issued on the life of said Drake, by the "Continental" and the "Knickerbocker" life insurance companies, in favor of his wife and children.

The bill charges that at the time of effecting the insurance,

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as well as at the time of his death, Drake was insolvent and largely indebted; that the insurance was effected by him with the intent to hinder, delay, and defraud creditors; that the annual premiums on these two policies, which amounted to the sum of \$1,149, was paid by the husband wholly out of his own funds, and that the creditors are entitled to subject to the satisfaction of their demands all the insurance over and above that purchased by annual premiums of \$500. Waller administered upon the husband's estate and became administrator of the wife, who was also dead, but he refused to demand payment of the amount due on the policies or to treat it as assets of the estate. Waller, as administrator of each estate, and the children and distributees of Mr. and Mrs. Drake, together with the two life insurance companies, were made defendants to the bill.

It prayed an injunction to prevent the insurance companies paying over the money and directing its payment to the administrator for distribution among creditors, and that the whole amount due on the policies, and if not so much, then all the insurance paid for by premiums in excess of \$500 per annum, be decreed subject to the satisfaction of complainants' claims, &c.

There were answers by some of the defendants, decrees *pro confesso* as to others, and two of the defendants, the Continental Life Insurance Company and S. C. Sheppard, who was husband of one of Drake's daughters, demurred to the bill on several grounds, and among others that it was multifarious.

The chancellor dismissed the bill without prejudice, reciting in his decree that the bill was multifarious, and "on that ground the said demurrs are sustained."

THOS. H. HERNDON and JOHN T. TAYLOR, for appellants. — The objection of multifariousness "is always discouraged where instead of advancing it would defeat justice." *Kennedy v. Kennedy*, 2 Ala. 609. The bill is in the nature of a creditors' bill, and it is not improper to make all the debtors of the defendant parties. 11 Ala. 448. There is but one fund here, and both debtors are chargeable alike. The two insurance companies were properly joined. 11 Ala. 448; 30 Miss. 472; 27 Miss. 234. Any other procedure would tend to the subversion of justice, and entail a needless multiplicity of suits.

W. P. & J. WEBB, *contra*. — The defence of all the defendants does not "centre in the same issue." 42 Ala. 297. A part of the defendants have no interest in the main question to be litigated. *Hardin v. Swoope*, 47 Ala. 273. Why require the insurance companies to pay for the costs of litigating

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the *intent* with which the policies were procured, in event complainants obtain a decree? They have no necessary connection with the other matters involved.

BRICKELL, C. J. — The appellants, claiming to be creditors of William B. Drake, deceased, who is averred to have died intestate and insolvent, filed this bill against the "Knickerbocker Life Insurance Company," the "Continental Life Insurance Company," and others, seeking to subject to the payment of their demands the sums due on policies of insurance, issued by said companies to the wife and children of said decedent, on his life. The policies were issued at different times, and were separate transactions. The bill is framed in view of the statute, R. C. § 3539 H. p. 672, which authorizes a married woman to insure the life of her husband, free from the claim of his representatives or creditors, *provided*, that if the husband pays annually premiums above the amount of five hundred dollars from his own funds or property for such insurance, then such exemption of liability to his creditors or representative shall obtain only in the proportion of five hundred dollars to the amount of premiums paid for such insurance. The bill alleges that each annual payment exceeded five hundred dollars. Two of the defendants only, Samuel C. Sheppard and the "Continental Life Insurance Company," interposed demurrers, assigning among other causes that the bill was multifarious in uniting in one suit the claim against two insurance companies, resting on separate and distinct policies. On this ground alone the demurrer was sustained, and the bill dismissed without prejudice. Sustaining the demurrer and dismissing the bill is now assigned as error.

The defendant Sheppard is the husband of the daughter of the said William B. Drake, who died in his life, and in the life of his wife; and otherwise than as husband, it is not averred he has any right in, or connection with, the subject-matter of the suit. Whether he was a proper party to the bill is not a matter presented for consideration. So far as he is concerned, the only inquiry is whether, if the bill is multifarious in the respect pointed out, it is an available objection to him. The bill may be multifarious as to one or more defendants, without being so as to others. When such a case is presented, the objection can only be taken by the defendants who are affected by it, on the same principle that a misjoinder of defendants is available only to the parties improperly joined. 1 Daniel Ch. Pr. 337, n. 3; *Attorney General v. Craddock*, 8 Simons, 466; *Warthen v. Brantley*, 5 Georgia, 571. If Sheppard has any right, it is the same in each policy of insurance, derived in the same capacity, and capable of assertion on the same

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facts. The bill proposing a distribution of the funds arising from the policies, if entitled to share in the distribution, it was proper he should be in court to attend to it. As to him, the case is as capable of prosecution in one as in two suits; and it would be useless to compel the institution of more than one to adjust his rights, all of which can be fully protected without it. His demurrer was not maintainable on this ground.

The object of the statute is to authorize an insurance on the life of a husband and father, for the benefit of his surviving wife and children, freed from the claims of his creditors. To these he owes the duty of maintenance and protection. The statute intended to guard against the perversion of this right or privilege into the means of defrauding creditors. Therefore, a limit is fixed beyond which he cannot pass, in paying premiums for such insurance from his own funds or property, which, in the absence of the statute, should have been appropriated to his creditors. If the limit is exceeded, the statute intervenes and devotes the excess of insurance which may be realized to the payment of his debts. It is not important whether more than one policy, or how many policies may be obtained, if the aggregate of premiums paid on the whole exceeds five hundred dollars, the rights of the creditors arise. The excess, above what five hundred dollars of annual premiums obtained, is withdrawn from the exemption. Otherwise, the fraud against which the statute intended to guard could be perpetrated with impunity. Several policies, the annual premiums on no one of which would exceed five hundred dollars, yet reaching that sum, might be taken, and the exemption allowed claimed as applying to each. In such case, the creditors seeking to condemn to the satisfaction of their demands the excess of insurance, purchased with the premiums above five hundred dollars, must bring before the court all the insurers. In no other way could they obtain the full measure of their rights. There is a common liability to the creditors resting on them. This case is of that character. To the claims of creditors the whole of the insurance purchased, except so much as was purchased with annual premiums not exceeding five hundred dollars, is subject. Though the policies are separate and distinct contracts, it is necessary to the complainant's relief that each insurer should be before the court, and the amount due from each collected, that the aggregate sum to be distributed to the insured and the creditors may be adjusted. It is a general rule in courts of equity, that a bill is not multifarious which unites several matters distinct in themselves, but which together make up the complainant's equity and are

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necessary to complete relief. 1 Daniel Ch. Pr. 339 (n. 1). The bill is not subject to the objection of multifariousness.

We do not pass any opinion on the other grounds of demurrer assigned. They do not appear to have been passed on by the chancellor, and are not before us for consideration.

The decree is reversed and the cause remanded.

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Appeal from Order dissolving Injunction.

1. *Answer; when disregarded.*—The appellate court, in reviewing an order dissolving an injunction, will not notice the denials of the answer, couched in language like the following: "Defendant denies the truth of the first eight and a half lines of paragraph two of the bill," and also "the truth of the first sixteen lines of section four of the bill," and the like.

2. *Bill; how construed.*—An averment of the bill that an estate, of which a party was the administrator, "is wholly insolvent" will be construed to mean that the estate has been duly reported and declared insolvent, if such construction militates against the complainant, or is necessary to uphold the chancellor's decree.

3. *Administrator of insolvent estate; authority of.*—The administrator of an insolvent estate has no authority to agree to receive a note made by his intestate, to a third person, in payment of, or as a set-off against, the price of property of the estate which he, as administrator, was selling.

4. *Set-off, bill to enforce; when without equity.*—A bill filed by the holder of a debt due from the intestate to obtain the benefit of a set-off in equity against a debt due the administrator of an insolvent estate, is without equity unless it shows that such debt has been duly filed and proved against the insolvent estate within nine months after the declaration of insolvency.

5. *Same.*—A surety cannot come into equity to enjoin the execution against him merely because the sheriff refuses to make the money out of the principal, although sufficient property, which he is "fast making away with," has been pointed out to the sheriff. There is an adequate remedy at law.

6. *Same.*—The fact that an administrator, to whom a note was due, knew or connived at the purpose of the principal not to defend the suit, with the view that the surety, who depended on the principal to make defence, would thereby be misled and fail to appear, is not such an excuse for the failure to defend at law as will enable the surety to come into equity to enjoin the judgment; especially is this the case when the surety has been once deceived by the principal as to the debt's having been paid.

APPEAL from Chancery Court of Lowndes.

Heard before Hon. HURIOSCO AUSTILL.

The opinion states the case.

GIRARD COOKE and D. S. TROY, for appellant.

STONE & CLOPTON, *contra*.

MANNING, J.—The motion to dissolve the injunction in this cause against execution of a judgment at law was made before the chancellor in vacation, upon grounds (first) that

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there was no equity in the bill; (secondly) upon the denials in the answer.

We cannot regard what purports to be the answer of Tyson as administrator. It is largely composed of such sentences as the following: "Defendant, on information which he believes to be true, denies the truth of the first 8½ lines of section 3 of said bill;" "Defendant denies the truth of the first sixteen lines of section 4 of said bill;" "That portion of said section 4, beginning in the middle of line twenty-two and extending to the end of said section, defendant has no knowledge of," &c. The lines referred to may be those of the original bill on file; perhaps those in a copy obtained from the register. They are certainly not the lines in the transcript sent to this court. We, therefore, cannot know, and have not time to employ in trying to find out, what parts of the bill are intended to be answered in the manner above set forth. Nor was it the duty, or perhaps the right of the register to undertake to enlighten us on the subject, otherwise than by sending a correct copy of the originals on file. We shall consider this cause as if there were no answer of the administrator Tyson on file.

Complainant in the bill sets forth that one George N. Nesmith, Jr., at the sale of property of the estate of his father in 1870, purchased a saw-mill and its fixtures, and the timber trees of a large tract of land on which it was situated, for which Nesmith, Jr., and complainant as surety for Nesmith, made to the administrator (defendant Tyson) their promissory note, on which Tyson, in the spring of 1874, had obtained a judgment at law against Nesmith and complainant Walker by default, for \$799³¹/₁₀₀ and costs. The bill further sets forth, that the mill and timber trees had been previously bought by Tyson's intestate, Nesmith, deceased, of one Arrington, to whom deceased executed his note therefor for \$972⁷⁸/₁₀₀, which had not been paid at the time of the administrator's sale of the property; that at the time of this sale, as complainant (Walker) is informed and believes, there was an understanding and agreement between the administrator and Nesmith the younger, that the latter should take up the note of the deceased to Arrington, and it should be allowed and received by Tyson the administrator "in payment for and as a set-off against" the price Nesmith, Jr., was to pay to him for the same property; that after the sale there was a like agreement between them on the same subject, in accordance with which, Nesmith, Jr., had taken up said note, "and the same was duly presented and made known to said administrator" about three years before the action at law was brought in which judgment had been obtained against Nesmith and complainant,

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and that Nesmith had told the latter, before the suit was brought, that the debt had been paid.

The bill further alleges that when the suit was brought, complainant (Walker) called upon and inquired of Nesmith why this was done, and was assured by the latter that he would defend the suit, and set off the Arrington note, and complainant need not have any uneasiness on the subject; that relying on these assurances, complainant did not defend the suit, and was deceived by Nesmith, who suffered judgment to go by default against them both; and on information and belief complainant charges that Tyson was aware of the deception and fraud practised by Nesmith against complainant, and connived at the same with Nesmith; and that the taking of the judgment by Tyson, regardless of his agreement to receive the Arrington note as a set-off or in payment, and knowing that the same was in the hands of Nesmith, was a fraud upon complainant.

The bill further alleges that after judgment an execution thereupon was levied on property of Nesmith sufficient for the payment thereof, which was afterwards released by the sheriff without consent of complainant, or any good reason or legal excuse therefor, although the sheriff knew that complainant was the surety only for Nesmith in the transaction; and upon information and belief complainant charges that said acts of the sheriff "were done with the full knowledge and without any objection on the part of said John A. Tyson, the plaintiff in said suit." It is further alleged that since the release of said property the sheriff has failed and refused to make any further seizure or levy of the property of Nesmith, though often urged by orator to do so; and that Tyson fails and neglects to have the same done; that Nesmith at the time of the judgment and execution had ample means and property to satisfy the same, and subject thereto, and has now, but has been and is engaged, as orator is informed and believes, in removing and secreting or disposing of the same; that the conduct of said sheriff and of Tyson "operates a serious injury and fraud upon the rights of orator;" that the sheriff has levied on and advertised for sale property of orator to satisfy the execution on said judgment; that orator is advised that the Arrington note having been given by deceased for the same property sold by his administrator to Nesmith, Jr., is, under the agreement made as aforesaid between them, a good set-off in equity against said judgment, but could not have been pleaded at law; and that "the said estate of Geo. M. Nesmith, deceased, is wholly insolvent."

Wherefore, complainant prays that Nesmith, Jr., the sheriff Bryan, and Tyson the administrator be made parties defend-

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ant; and for an injunction against the execution of the judgment, and "for all general relief to which orator may be entitled under the averments of the bill."

The bill of complaint must be taken most strongly against complainant. A person undertaking to make out a good case or defence is presumed to frame the averments as favorably for his side as the facts will permit.

It is alleged that the estate of which Tyson is administrator "is wholly insolvent." The administrator being appointed by law, and required to give bond with sureties for the faithful discharge of his important duties, it must be understood, since the law requires him to do so and the bill is silent on the subject, that he has reported the estate insolvent. When he did so, or when it proved to be insolvent, or when Tyson became administrator, is not shown.

But as administrator of an estate "wholly insolvent," it was his plain duty to get in the assets, convert them into money, and have this ready for distribution *pro rata* among the creditors, who themselves would have the right to contest with one another the validity of their respective claims. Tyson, therefore, could not lawfully agree to receive the note made by his intestate to Arrington, "in payment of," or "as a set-off against" the price of property of the estate which he as administrator was selling. And a court of equity would not interpose to compel him to do what would be a breach of trust.

Indeed it does not appear from the bill that the Arrington note is a valid claim against the estate. To make it so, it must have been filed, accompanied by an affidavit of its correctness, as a claim against the estate, within nine months after it was reported insolvent; otherwise it is forever barred. Rev. Code, § 2196. Without this it could not be used as a set-off even against a debt that the holder of it owed to the deceased at the time of his death, when the two claims constituted mutual debts between the parties. *Bell's Adm'r v. Andrews*, 34 Ala. 538.

It is not pretended by complainant that he was induced to sign, as surety for Nesmith, the note given by the latter to Tyson by any representations or promises made by Tyson to him, or of which he had been told before he signed the note. "On information and belief," he alleges that the understanding and agreement about the Arrington note was made between Nesmith and Tyson. He seems never to have interchanged a word on the subject with Tyson himself, either before or after the judgment. Whatever deception or fraud was practised on complainant is chargeable not against Tyson the administrator and creditor, but against Nesmith. True it is alleged on information and belief, that Tyson "was aware of the deception

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and fraud practised, and then being practised by said Nesmith on orator, and that he connived at the same with said Nesmith, knowing that orator would thus be induced to stay away from said trial, and that said Nesmith would not make defence," &c. Being aware of, and conniving at, the acts of another do not constitute a conspiring or collusion with that other, and nothing in the relation between the administrator and the surety for a debt due to the administrator imposes the duty on the latter of doing anything to encourage the surety or the principal to resist the payment of the debt. And since complainant shows that Nesmith had deceived him before in reference to the debt being paid, his trust in Nesmith to make the defence, if he had one, at law, constitutes no such excuse as a court of equity can recognize as valid, for his not doing so himself. He does not pretend that the creditor Tyson said or did anything which prevented him from defending the suit.

If it be true, as complainant alleges, that defendant Nesmith had ample means and property for the payment of the judgment and execution, section 2862 of the Revised Code provides a mode by which complainant might have coerced the sheriff to levy thereupon instead of upon complainant's property, or subjected the sheriff and his sureties to responsibility to complainant in damages. But under the allegations of the bill complainant is not entitled to an injunction against Tyson to prevent satisfaction of the judgment and execution in his favor as administrator of an insolvent estate.

The order of the chancellor is affirmed with costs.

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Real Action in the Nature of Ejectment.

1. *Ejectment; what purchaser at execution sale must show, to maintain.*—In ejectment by a purchaser at execution sale, he must show that the defendant in execution had some interest or estate in the lands sold on which the judgment could operate.

2. *Acknowledgment of deed; effect of.*—Where two only of three signers of a deed are mentioned therein as grantors, and they, alone, acknowledge its execution, this dispenses with all further evidence of its execution by them.

3. *Title deeds; when not presumed to be in possession of purchaser.*—The title deeds of a defendant whose estate has been sold and conveyed under compulsory legal process, are not presumed to be in the possession or under the control of the purchaser.

4. *Same.*—In such case the purchaser, under our statutes, need only produce a certified transcript of the records of such deeds, without accounting for the originals.

5. *Sale of land after defendant's death; when valid.*—Section 2875 of the Revised Code authorizes a sale of the defendant's land after his death, under an *alias* or *pluries fieri facias*, when the writ was received by the sheriff while de-

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pendant was in life, and has been regularly kept up without the lapse of an entire term.

6. *Conveyance of land; what essential to.* — Under the provisions of the Revised Code, no conveyance is effectual to pass real estate, unless attested by one, and where the grantor cannot write, by two witnesses, or acknowledged before a proper officer.

7. *Acknowledgment of ineffectual conveyance; to what will not relate.* — The subsequent acknowledgment of an ineffectual conveyance to a voluntary grantee, will not relate back to the signing and delivery of the deed, so as to prejudice the rights of execution creditors.

APPEAL from the Circuit Court of Dallas.

Tried before Hon. M. J. SAFFOLD.

This was a real action under the Code, by appellee against appellants. Plea, Not guilty, and that defendants entered upon the lands on the 28th of January, 1868, as tenants of one Spann, and they surrendered the possession thereof to him on the 31st of December, 1868, and that if plaintiff is entitled to recover, he is only entitled to damages for the detention from the time his title accrued, not beyond the time of the commencement of the entry of defendants, up to the time their possession was discontinued.

Plaintiff below claimed as purchaser at execution sale against one Walker, and offered testimony tending to prove that the lands sued for were in possession, formerly, of W. Seawell and wife, and were known as the Seawell place. He then showed the transcript of a deed properly certified from the records of the probate court of Dallas county, the county in which the lands are situated, signed by W. Seawell and his wife, and W. B. Seawell, to Walker; in the body of the deed W. Seawell is named as grantor, and is described in the following language: "William Seawell, as trustee by appointment in chancery of the separate estate of his wife, Matilda Ann Seawell, William Seawell, as husband of said Matilda Ann." The lands conveyed are described as the separate estate of Matilda Ann Seawell, and it does not appear for what purpose W. B. Seawell signed the deed. It was attested by two witnesses, and was acknowledged by W. Seawell and wife, but was not acknowledged by W. B. Seawell, nor was his signing proved by the attesting witnesses or either of them. Defendants objected to the introduction of this transcript, but the objection was overruled, and the transcript admitted in evidence, and the defendants excepted. The testimony also showed that Walker was indebted to one Saltmarsh, by note, executed in 1859, in renewal of a debt contracted in 1853, and that on the 23d of May, 1867, judgment was rendered on the debt against Walker in favor of Saltmarsh's executors; and that on the 7th of March, 1868, two other judgments were rendered against Walker, in favor of other persons, upon debts contracted in 1867. Executions were duly issued on all three judgments

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during Walker's lifetime, and other executions were regularly issued thereon, without the lapse of an entire term, until January 18, 1869, when the lands sued for were sold under the executions and conveyed to plaintiff by the sheriff. Walker died June 5, 1868.

Defendants were tenants of one Spann, who claimed the premises as administrator of the estate of his deceased wife. She, in her lifetime, was the daughter of Walker, and the testimony tended to show that the lands were bought from Seawell by Walker as a gift for her in 1859, and that when Seawell vacated the premises, Spann and wife went into immediate possession, and Walker never had actual possession or control thereof. On the 4th day of January, 1860, Walker signed and delivered to her a deed, intended as a deed of gift of the premises to her, but it was not attested by witnesses, nor was it ever acknowledged by him until April 28, 1868. It was recorded without attestation or acknowledgment, January 17, 1868. On April 28, 1868, Walker properly acknowledged it, and it was again recorded May 4, 1868. This conveyance was not supported by any valuable consideration, but at the time it was signed in 1860 the testimony tended to show that Walker was unquestionably solvent, and that he "was good in bank for fifty thousand dollars."

It was agreed between the parties that if plaintiff was entitled to recover, the amount of the recovery of damages for the detention should be the sum of nine hundred dollars. Mrs. Spann died in 1870; she left children, living at the time of the trial in this case, and her estate was administered on by her husband. John F. Varey was appointed administrator of the estate of Walker on September 19, 1868, and he had it decreed insolvent, April 10, 1871.

The court charged the jury, at the written request of the plaintiff: 1. That if they believed the evidence, they must find for the plaintiff. 2. If they find for the plaintiff, he will be entitled, under the evidence, to recover nine hundred dollars rent for the land, with interest from the 1st of January, 1870. Defendants excepted to each of these charges and now assign them as error.

FELLOWS & JOHNS and P. LOCKETT, for appellant.

PETTUS & DAWSON and BROOKS, HARALSON & ROY, *contra*.

BRICKELL, C. J. — A plaintiff in ejectment, claiming under a purchase at sheriff's sale, must prove that the defendant in the judgment, to whose title he claims to have succeeded, had an interest or estate in the lands, on which the

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judgment operated. If the defendant in the judgment is the tenant in possession, against whom the action is commenced, the possession is *prima facie* sufficient evidence. Or, if the action is against a stranger to the judgment, the recent possession of the defendant, attended by acts of ownership, is *prima facie* sufficient. *Cook & Hardy v. Webb*, 18 Ala. 810; *Heydenfeldt v. Mitchell*, 6 Ala. 70; *Badger v. Lyon*, 7 Ala. 564.

The appellee, to show a legal title in Walker, the defendant in the judgments, proved that the premises in controversy were for some years in the quiet possession of Seawell and wife, who cultivated and occupied them, and during such occupancy, they were known as "the Seawell tract of land." He then offered in evidence the record in the court of probate of Dallas county (in which county the lands are situate), of a conveyance from Seawell and wife to Walker, made prior to the judgment. This record the parties consented to receive as a certified transcript, and in lieu of such transcript. The appellants objected to the introduction of the deed, but their objection was overruled. In the body of the deed, Seawell and wife only are nominated as grantors, and by them it is signed and sealed, and properly acknowledged. The deed is also signed and sealed by one W. B. Seawell, but for what purpose, or in what capacity, is not disclosed. The execution of the deed is not acknowledged by him. In support of the objection, the appellants insist the statutes contemplate an acknowledgment by all the grantors, before the deed can be received, without other evidence of its execution than the certificate of acknowledgment. It is not necessary to inquire what is the relation of W. B. Seawell to this deed. It may be, that by signing and sealing, he has adopted it, and rendered all its averments as obligatory on him as if in the body of the deed he had been nominated as a grantor; or as the warrantor, that the grantors would keep and perform its covenants. However this may be, when the parties nominated in the body of the deed as grantors, and who only by express words grant and convey, properly acknowledge it, then the acknowledgment dispenses with all further evidence of execution by them. R. C. § 1544. It is their deed operating a conveyance of their estate. *Ayres v. McConnell*, 2 Scam. 307; *Bradford v. Dawson*, 2 Ala. 203; *Williams v. Jones*, Ib. 314. The plaintiff had given *prima facie* evidence that the legal title resided in the grantors, who had acknowledged the conveyance. If this *prima facie* evidence did not disclose the fact, the burden of proving it rested on the appellants.

When the original of a conveyance, which has been properly acknowledged or proved, and recorded, is not in the custody, or under the control of a party compelled to use it as

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evidence, a transcript from the record, duly certified, is received in the place of the original. R. C. § 1544. The custody or control of the title-deeds of a defendant, whose estate is, by compulsory sale under judicial process, sold and transferred to another, cannot be imputed to the purchaser; and under this statute, it was competent for him, without accounting for the original, to introduce a certified transcript of the record of the deed. *Badger v. Lyon, supra.*

Lands were not, at common law, subject to execution, or in any manner bound by a judgment. *Morris v. Ellis*, 3 Ala. 560; *Erwin v. Dundas*, 4 How. (U. S.) 77. The statutes existing prior to the Code, subjected them to the writ of *elegit*, and to the ordinary writ of *feri facias*; and the operation of the statutes was, that the judgment created a lien on the lands from the day of its rendition. *Morris v. Ellis, supra.* As it was the judgment which operated the lien, it followed that after the death of the defendant therein, lands could not be levied on and sold for its satisfaction. By operation of law, on the death of the defendant, the title to his lands was cast on his heirs, if he died intestate; or if he died testate, devolved on his devisees. The judgment and execution would then affect new parties, who were entitled to a day in court, to show cause against charging the lands which had descended to, or devolved upon them. *Lucas v. Price*, 4 Ala. 679; *Mansony v. U. S. Bank*, Ib. 735; *Abercrombie v. Hall*, 6 Ala. 657; *Burks v. Jones*, 13 Ala. 167; *Fry v. Br. Bank Mobile*, 16 Ala. 282; *Erwin v. Dundas, supra.*

The statute of 1828 (Clay's Dig. 197, § 27) gave judgment creditors a *scire facias* against the personal representative and heirs of the deceased debtor, to subject land descended to the satisfaction of the judgment, and authorized the award of execution for that purpose.

The Code repealed the statute authorizing the writ of *elegit*, or rather it was repealed because not reenacted therein. It prescribes the form of a writ of *feri facias*, the mandate of which is directed as well against the lands and tenements, as the goods and chattels of the defendant. R. C. § 2837. The *feri facias* is declared a lien only within the county in which it is received by the officer, on the lands and personal property of the defendant, subject to levy and sale, from the day it is received by the sheriff, and it continues only so long as the writ is regularly issued without the lapse of a term. R. C. § 2872. The lien of the judgment on lands, under the former statutes, was not confined to the county to which a writ of execution issued, nor to the county in which the judgment was rendered, but was coextensive with the State. *Campbell v. Spence*, 4 Ala. 543. Nor was the lien of the judgment lost,

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by the failure of the plaintiff to sue out execution from term to term. *Turner v. Lawrence*, 11 Ala. 426; *Bagby v. Reeves*, 20 Ala. 427; *De Vendell v. Hamilton*, 27 Ala. 156. It will be observed that the Code obliterates entirely the distinction existing under the former statutes as to the lien of judgments and executions. The lien is no longer attached to the judgment, but to the execution. It attaches to lands, and goods, and chattels, at the same time. As to each, it is confined to the county to which the execution issues. The lien as to each is lost by the same *laches*, the failure to keep alive the execution from term to term. The distinction having been obliterated thus far, the Code not only does not authorize a *scire facias*, or other remedy by which lands descended can be subjected to the satisfaction of a judgment against the ancestor, but it declares in express terms: "When a judgment has been rendered against the decedent, before his death, no execution can issue thereon against the personal representatives, except in the case provided for in section 2875 (2459); nor can the judgment be revived against them except by suit on the judgment." R. C. § 2289. Section 2875, provides: "A writ of *feri facias* issued and received by the sheriff during the life of the defendant may be levied after his decease, or an *alias* issued and levied, if there has not been the lapse of an entire term, so as to destroy the lien originally created." The judgment not now operating a lien, and the writ of *feri facias* issuing as well against lands, as against goods and chattels, and the lien being attached to it, the section of the Code last quoted cannot be construed otherwise than to authorize the levy and sale of lands, as well as goods and chattels, under an *alias* or *pluries fi. fa.*, which is a regular continuance of execution, after the death of the defendant. No revivor can be had against his heirs or personal representatives, and if such sale is not authorized by this statute, the lien is lost. There is not a want of conformity of the writ to the judgment, in such case, as there was when the judgment was a lien. Then, the lands having descended, the execution would not authorize a sale, when the heir in whom the title resided was not a party to the judgment. Now, the execution conforms to the judgment, and the *alias* or *pluries* is not original process, but a continuation of the original issuing in the life of the ancestor, to which the law attaches a lien. The levy and sale of the real estate was not therefore void because made under *alias* and *pluries fi. fa.* regularly issued after the death of the defendant. *Hurt v. Nave*, 49 Ala. 459. Such was the law in reference to personal property, prior to the Code. See authorities, 1 Brick. Dig. 893, § 43. The evident purpose of the Code is to obliterate the distinction previously existing between liens on lands,

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and goods, and chattels, and to prescribe a uniform rule operating alike on each, and conforming to the law as it had been declared as to goods and chattels.

Walker, the defendant in the judgments, on the 4th April, 1860, in consideration of natural love and affection, made an instrument in writing purporting to convey the lands to his daughter, Mrs. Spann, under whom the appellants claimed to hold possession. This instrument was not attested, nor was it acknowledged before any officer, authorized to take the acknowledgment of conveyances, until April 28, 1868, after the rendition of the judgments under which the appellee claims to have purchased, and while executions issuing thereon were in the hands of the sheriff of the county in which the lands were situate.

The Code declares conveyances for the alienation of lands must be attested by one, or where the grantor cannot write, by two witnesses. An acknowledgment of execution, before an officer authorized to take it, dispenses with the necessity of attestation. R. C. §§ 1535-6. By the common law, neither attesting witnesses nor an acknowledgment of execution before a public officer was necessary to the validity of a deed. These constituted only evidence of authenticity, which compelled a party relying on the deed to proof of a different character from that he would otherwise be required to produce. *Robertson v. Kennedy*, 1 Stew. 245; *Dillingham v. Brown*, 38 Ala. 311. Prior to the Code this rule of the common law obtained here. *Robertson v. Kennedy*, *supra*; *Wiswall v. Ross*, 4 Port. 321. By the ancient common law, a feoffment was the mode by which lands were conveyed. To its validity livery of seizin was indispensable, and the livery implied publicity and the presence of witnesses. The statute of uses introduced the modes of conveyance now prevailing, which of themselves operate a transmutation of possession as effectually, in legal contemplation, as the livery of seizin at common law. In earlier days but few could write or sign their names, and it was in this time it became the rule of law, that witnesses were not essential to the validity of conveyances. The publicity and notoriety attending livery of seizin were the only safeguards which could be practically required as a protection against fraudulent and clandestine conveyances. Since the statute of uses, even while the common law rule was prevailing, it was but seldom a conveyance was not executed in the presence of attesting witnesses, or after statutes were passed authorizing an acknowledgment of execution before officers of the law, that it was not acknowledged. Common prudence suggests to the parties the importance and necessity of procuring such evidence of execution.

The Code is something more than a mere compilation and

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revision of former statutes. Not only are many former statutes entirely omitted, but many of its provisions are repugnant to such statutes. In it are incorporated many of the expositions of the common law, pronounced by this court, and which had not been the subject of legislative enactment. So, in many of its provisions, it abrogates common law principles which the decisions of this court had firmly engrafted on the jurisprudence of the State. It approximates very nearly the acceptation of the title applied to it: "A body of laws established by the authority of the State, and designed to regulate completely, so far as a statute may, the subjects to which it relates." In its interpretation and construction, it is necessary so to regard it, if full effect is given to the legislative intent in its adoption, and if all its provisions are rendered harmonious. The sections under consideration can have but one office to perform in this view. They operate an abrogation of the common law rule, and substitute in its stead the essentials of an alienation of lands. These essentials must be observed, or the alienation is unauthorized and ineffectual. They cannot be esteemed as providing a mere cumulative mode of conveyance, for at common law the mode of conveyance prescribed would be valid and operative, and would have been generally observed. As no conveyances are now in use here which livery of seizin ever attended, the purpose was to require, as indispensable to an alienation of lands, an authentication of the act partaking of the character of the conveyance by which it was done; as the title could pass only by writing, that there must be witnesses to its execution subscribing in writing, or an acknowledgment before an officer of the law authorized to take and certify it. A safeguard against fraud, perjury, and clandestine conveyances is thus provided. Such safeguard is a necessity to the security of titles.

In the case of *French v. French* (3 N. Hamp. 234), in which the conveyance was very similar to that made by Walker to his daughter, — a conveyance founded only on the consideration of love and affection, which was not attested by two witnesses as required by the statutes of that State, was declared invalid as a deed. A like decision, founded on a similar statute, was made by the supreme court of Connecticut, in *Merwin v. Camp*, 3 Conn. 35. A statute of Ohio, passed in 1805, declared that deeds for the conveyance of lands "shall be signed and sealed by the grantor, in the presence of two witnesses, who shall subscribe the said deed of conveyance, attesting the acknowledgment of the signing and sealing thereof," &c. A deed attested by one witness only, founded on a valuable consideration, was declared insufficient to pass the legal estate, and inadmissible as evidence of a conveyance. *Courcier*

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v. *Graham*, 1 Ham. (Ohio) 154. The supreme court of the United States, in following this decision, was met by the objection, that as other modes of conveyance than that prescribed were not expressly prohibited, the deed should be regarded as valid at common law. But the court said: "Although there are no negative words in this clause declaring all deeds for the conveyance of lands executed in any other manner to be void; yet this must be necessarily inferred from the clause, in the absence of all words indicating a different legislative intent." *Clark v. Graham*, 6 Wheat. 577. The court of appeals of South Carolina gave the same construction to a similar statute of that State. *Alston v. Thompson*, Cheves' (Law), 271. The general rule is, that if a statute limits a thing to be done in a particular form or manner, it excludes every other mode; and affirmative expressions introducing a new rule imply a negative. Sedgwick on Stat. & Cons. 31. This rule appears to us to be peculiarly applicable to the statutory provisions embodied in a Code intended to supersede, as to the matters embraced in it, not only existing statutes, but common law principles. The instrument intended as a conveyance to Mrs. Spann, not being attested or acknowledged, was inoperative to pass to her the legal estate until its acknowledgment in 1868.

It is insisted this acknowledgment must, by relation, be referred to the day of the signing and delivery of the instrument, and that thereby the instrument becomes effectual from that day. "*Relatio est fictio juris*," and like all fictions of law, is designed to answer the purposes of justice, not to prejudice the right, or work injustice to any one. They are indulged to preserve and effectuate, not to thwart or subvert legal rights and remedies. However this conveyance may operate as against the grantor and his heirs, by relation, it cannot be permitted to defeat the rights his creditors had acquired. When they obtained judgments, and regularly issued executions, they acquired liens, which the defendant in execution could not destroy or impair. He then had the legal title to the premises, — a title on which he could have supported ejectment against the grantee in the imperfect instrument of conveyance. That instrument not being founded on a valuable consideration, the grantee could not in equity have compelled its completion, or have enforced it as a contract to convey. Whether it would be completed rested entirely in the volition of Walker. The spur of these judgments may have quickened him into an exercise of this volition variant from that he would have exercised, if not embarrassed by them. He had as much power to have made an original voluntary conveyance, operating to defeat his judgment creditors, as to impart validity to this imperfect conveyance voluntarily. Each is the creature of

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his mere will. In *Pollard v. Cocke* (19 Ala. 188), it is held, the registration of a conveyance after the time within which it should have been recorded, and after a creditor had obtained a lien by judgment, could not by relation postpone or defeat the lien of the judgment. The general rule is, that amendments of pleading have relation to the commencement of suit, without regard to the time or the stage of the cause when introduced. This fiction is not permitted to operate so as to deprive the party against whom the amendment is made of any substantial right. An amendment of a complaint or declaration introducing a new claim, or new matter, as to which the statute of limitations has perfected a bar, cannot by relation be referred to the commencement of suit, to avoid the bar. *King v. Avery*, 37 Ala. 169; *Bradford v. Edwards*, 32 Ala. 168. As is said in *Jackson v. Davenport* (20 Johns. 551), "This limitation of the fiction, so as to prevent it from doing injury to strangers, or defeating mesne lawful acts, is the common language of the books." The acknowledgment of the instrument by Walker cannot by relation be referred to its original signing, so as to impair the liens of execution creditors.

The result is, the circuit court did not err in any of its rulings, and the judgment must be affirmed.¹

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Action against Common Carrier for Failure to deliver Live Animals.

1. *Agent, acts of one claiming to be; when admissible against principal.* — The fact and scope of an agency being established, acts of one who was where the agent should have been, and exercising the authority he had, are competent evidence to enable the jury to determine whether such person was in fact the agent; and the fact that this is controverted affects the weight, not the admissibility of the evidence.

2. *Common carrier; how far may restrict common law liability by special contract.* — A common carrier can make no contract protecting him against liability for his own or his servant's negligence, but may, by special contract with the shipper, reasonably restrict his common law liability in other respects.

3. *Same; burden of proof.* — The carrier cannot escape liability for loss or injury to property transported under special contract, unless he shows not only a loss or injury from a cause within the limitation, but also that it was occasioned without negligence on his part.

4. *Same; responsibility of carrier of live-stock.* — A carrier, undertaking the transportation of live animals, in the absence of a special contract, is chargeable on its common law liability for their safe delivery; but is not responsible for loss or injuries resulting from their nature or propensities.

5. *Special contract, validity of; how determined.* — Whether a special contract is

¹ This case was decided at the January term, 1875.

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reasonable and just must be pronounced by the court, in view of all the attending circumstances.

6. *Same; what is reasonable and just.* — A stipulation in a special contract, entered into in consideration of reduced rates and a free pass to the owner, that he shall attend the live-stock and care for it, at his own expense, in case of accidents, is reasonable and valid; and the carrier, if not wanting in the diligence required of him, is not liable for losses occasioned by the shipper's inattention in these respects.

7. *Same.* — A stipulation in a special contract (entered into in consideration of reduced rates and a free pass to the shipper) that the value at the time and place of shipment, *not to exceed fifty dollars per head for ordinary beef cattle*, should be the measure of recovery for any loss for which the carrier is liable, is just and reasonable, and is the measure of the carrier's liability. (MANNING, J., dissenting on this point).

APPEAL from Circuit Court of Montgomery.

Tried before Hon. JAMES Q. SMITH.

This was an action brought by the appellees, Henlein & Barr, against the appellant, the South & North Alabama Railroad Company, for the failure to deliver a steer received for transportation to Montgomery, Ala.

The steer and nineteen other cattle were delivered at Nashville to the Louisville & Nashville Railroad Company, for transportation to Montgomery, Ala., under a special contract of shipment signed by the railroad agent and the owners of the stock.

This contract, after reciting the receipt of the cattle, name of consignee, and destination, and that connecting lines over which the cattle are transported shall be considered a part of the route, &c., proceeds as follows: "That whereas the Louisville & Nashville Railroad Company and connecting lines transport live-stock only at first-class rates, except when, in consideration of a reduced rate in car-load, the owner and shipper assumes certain risks specified below: NOW IN CONSIDERATION of said railroads' agreeing to transport the above described live-stock at the reduced rate of \$75 per car-load, and a free pass to the owner or agent on the train with the stock, the said owner and shipper hereby assumes (and releases said railroad company from) all injury, loss, and damages or depreciation which the animals or either of them may suffer in consequence of either of them being weak, or escaping, or injuring themselves or each other, or in consequence of overloading, heat, suffocation, fright, viciousness, or of being injured by fire, or the burning of any material, while in the possession of the company, and from all other damages incident to railroad transportation, which shall not have been caused by the fraud or gross negligence of the railroad company."

"It is further agreed, that in case of accidents or delays of time, from any cause whatever, the owner and shipper is to feed and water and take proper care of the stock at his own expense."

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"It is also agreed, that the owners and shippers, or his or their agent in charge of stock, shall ride upon the freight train upon which the stock is transported, and do assume (and release said railroad company from) all risk of personal injury while on or about the trains of the company."

"And it is further agreed, that should loss or damage occur for which the company may be liable, the value at the place and date of shipment shall govern the settlement, on which the amount claimed shall not exceed for a stallion or jack \$300; for horse or mule \$150; cattle \$50; other animals \$25."

The special contract also contained other stipulations that the cattle were to be loaded and unloaded at the shipper's risk; that while the company would afford the shipper or his agent all proper assistance in feeding and caring for the stock, the running of the trains was not to be delayed thereby, but that a car might be left at any station, for the purpose of feeding and resting cattle, upon the application of the person in charge, and be forwarded by the next freight train. It further recited that the cattle were delivered under the stipulations, conditions, and understandings which have been carefully explained to and fully understood by the owner and shipper. The name of Jacob Strauss, as the person who was to accompany the stock, was given in by the owners and inserted in the contract. The railroad of defendant is one of the connecting lines mentioned in the contract, and extends from Montgomery to Decatur, a distance of 185 miles. It took some fifty-five hours for the freight train to run this distance, which was considerably more than double the time usually required.

On the arrival of the freight train at Montgomery, a steer "one of the best of the lot," weighing 1,500 or 1,700 pounds, and worth from six to seven and a half cents a pound, was found dead. It bore no external marks of violence, and Strauss, the shipper's agent, testified that he was of opinion that it died from "over-heating." The car upon which the steer was, was in good condition and contained only the usual number of cattle.

The witness Strauss, the person employed by the owners to accompany the cattle, testified that he went on the train with the cattle for some distance below Decatur, when, being hungry he got off the freight train and went ahead to Birmingham (a station between Decatur and Montgomery), remaining there until early Sunday morning, and the cattle not having arrived, he came on to Montgomery on the passenger train; that when he quit the cattle he left no one in charge of them.

The defendant introduced one Cox, its agent at Birmingham, who testified that about 11 A. M. on Saturday a car-load of cattle which he identified as appellee's, arrived at Birmingham

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and were then in good condition, and at first, finding no one in charge of the stock, was about to switch off the car and feed and water them, as was the custom of defendant when no one accompanied stock; but at this time a person came up who appeared to have charge of the stock, and stated that he was in charge of them and declined witness' offer to switch off the car, and feed the stock, and refused to permit it to be done; that it was not defendant's custom to feed and care for stock, or offer to do so, when in charge of any one, except when there had been delays. The court, after the testimony was all in, on motion of plaintiff, excluded the testimony of Cox as to the refusal of the person, claiming to be in charge of the stock, to allow the stock to be fed, and the witness' offer to do so, on the ground that defendant had not shown that such person was plaintiff's agent; to which ruling exception was duly reserved.

There was testimony on the part of the defendant to the effect that there was no regular schedule for freight trains; that none had been given out or published; that the freight trains ran by telegraph, and their movements were controlled by the amount of business and trains on the road; but the same testimony showed that the usual time between Decatur and Montgomery was twenty-four hours. It was not shown what occasioned the delay in the present case.

The court, at the request of the defendant, gave several written charges, and refused others asked by it. Among the charges thus refused was one which instructed the jury, "in event the defendant was liable, that they could not assess the damages at a greater sum than fifty dollars, with interest from the date of the death of the ox." Another asserted that, under the special contract, the burden of proof as to negligence, and the cause of the loss of the ox, was upon the plaintiff, and not shifted by proof of the death of the ox. Others asserted that under the contract of shipment the defendant was not liable as a common carrier; that mere delay upon the road was not of itself evidence of negligence; that the evidence in relation to the death of the steer was insufficient to show negligence on the part of the defendant; and that if the jury believed the ox would not have died if he had been watered, to find for defendant. To each of these refusals the defendant duly excepted. The jury rendered a verdict in favor of the plaintiffs for \$75. As the court did not pass upon the correctness of each of these charges in detail, it is unnecessary to refer to them more specifically. The exclusion of the testimony of the witness Cox, and the refusal to give the charges requested, are now assigned for error.

RICE, JONES & WILEY, for appellant.

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SANFORD & MOSES, *contra*.

BRICKELL, C. J. — The contract of shipment contemplates that the owner or his agent shall attend the live-stock while in the course of transportation, and imposes on him the duty of feeding and watering them, at his own expense, if delays or accidents occurred. The stock left the place of shipment in charge of an agent of the owner, who was with them, when delivered to the appellant. The cause of the death of the animal, for the loss of which a recovery is sought in this case, was matter of controversy in the circuit court. Delays in transportation had occurred, and it may have been supposed the want of food and water, during the delay, was the cause of death. The appellant, to relieve itself from all imputation of negligence in this respect, offered to prove that at Birmingham, after the delays, when no visible injury had happened, its agent proposed to a person, claiming to be in charge of the stock, to switch off the car, on which the stock was loaded, and feed and water them. This person refused to permit this to be done. The court excluded this evidence, because not connected with other evidence, that the person to whom the proposition was made was the agent of the owners.

The acts or declarations of one professing to be the agent of another are not binding on the principal until his authority is shown, or the assent to, or ratification of such acts or declarations. *McClung v. Spotwood*, 19 Ala. 165.

When the fact of agency rests in parol, its existence and the extent of the authority conferred are matters of fact for the determination of the jury. Whatever evidence has a tendency to prove the agency is admissible. In the case cited, C. J. DARGAN said: "The correct rule is this, if there be no proof whatever tending to prove the agency, the act may be excluded from the jury by the court; but if there is any evidence tending to prove the authority of the agent, then the act cannot be excluded from them, for they are the judges of the weight and sufficiency of the testimony." In determining the admissibility of evidence, its sufficiency must be lost sight of in a great degree; it may be weak and inconclusive, yet if it is relevant and has a tendency to prove a material fact, it cannot be excluded without invading the province of the jury. When the fact offered to be proved is connected with the fact that the contract of shipment contemplates the presence of the owner or his agent during the transportation of the stock, and imposes on him the duty of watering, feeding, and caring for them, and with the fact that when the stock left the place of shipment they were in charge of an agent, who was with them when delivered to the appellant; the evidence offered was admissible. The fact that the

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person to whom the offer was made was in charge of the stock, claiming to be the agent, in connection with these facts, had a tendency to show he was the agent; and in the absence of contradictory evidence might have been received by the jury as sufficient. He was where the agent should have been, and exercising the authority the agent had. The point of dispute is not whether the owners had an agent who should have been in charge of the stock at the time and place of the offer, but whether the person to whom the offer was made was such agent. The existence of an agency not being controverted, the evidence should have gone to the jury, and under proper instructions from the court they should have determined whether the person to whom the offer was made was or not appellee's agent. The evidence given by the appellees that their agent left the train conveying the stock before it reached Birmingham, and was not there when the train arrived or left, does not affect the admissibility of the evidence rejected. It was contradictory of the fact that the person to whom the offer was made was the agent of the appellees; but the fact that evidence is in conflict with or contradictory of other evidence is not involved in an inquiry as to its admissibility. Its credibility and sufficiency is affected by such conflict or contradiction, and there the duty of the jury intervenes to determine the weight it should receive in view of the conflict.

The charges refused by the circuit court were framed with reference to stipulations in the special contract of shipment. The contract purports to have been made by the shipper in consideration of a reduced rate of freight, and a free pass to him or his agent, on the train with the stock to be carried. One of the stipulations is thus expressed: "The said owner and shipper hereby assumes (and releases the said railroad) from all injury, loss, and damage, or depreciation, which the animals, or either of them, may suffer in consequence of their being weak, or escaping, or injuring themselves or each other, or in consequence of overloading, heat, suffocation, fright, viciousness, or being injured by fire, or the burning of any material while in the possession of the company, and from all other dangers incident to railroad transportation, which shall not have been caused by the fraud or gross negligence of said railroad company." The other stipulations, so far as necessary to be considered in this case, are, "That in case of accidents to, or delays of time from any cause whatever, the owner and shipper is to feed, water, and take proper care of the stock, at his own expense;" and if loss or injury for which the carrier may be liable should occur, the value at the time and place of shipment should govern the settlement, and the amount claimed should not exceed fifty dollars for any one of the stock.

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By the common law a common carrier is absolutely liable for the safety of goods intrusted to him for transportation. Whatever loss or injury may happen, he must answer for, unless he shows it was caused by "the act of God, or of a public enemy, or by the fault of the party complaining." 1 Smith's L. C. 315. When a loss or injury happens, the *onus probandi* rests on the carrier to exempt himself from liability; for the law imposes on him the obligation of safety. The owner or shipper is bound to prove no more than that the goods were delivered to the carrier, and the failure to deliver them safely. These facts are *prima facie* evidence of negligence or misconduct. *Steele & Burgess v. Townsend*, 37 Ala. 247; *Pierce Am. R. R. Law*, 467; 1 Smith L. C. 318. The carrier may, by special contract with the shipper, limit his common law liability; but no limitation of his liability can relieve him from responsibility for loss or damage resulting from his own negligence. *Steele & Burgess v. Townsend, supra*; *So. Ex. Co. v. Crook*, 44 Ala. 468; *York Co. v. Central Railroad*, 3 Wall. 107; *R. R. Co. v. Lockwood*, 17 Wall. 357; *S. E. Co. v. Caperton*, 44 Ala. 101; *M. & O. R. R. Co. v. Hopkins*, 41 Ala. 486; *M. & O. R. R. Co. v. Jarboe*, *Ib.* 644. If a special contract is made and a loss or injury occurs, the carrier cannot claim exemption from liability, unless he shows not only that the cause of the loss or injury was within the limitation of the contract, but that it was without negligence on his part. *Steele & Burgess v. Townsend, supra*, and authorities there cited; 2 Redf. Railways, § 160.

It is only since the introduction of railways, and they have become the principal agencies in transportation by land, that the carriage of live-stock has grown to be an important branch of the business of common carriers. Whether the carrier shall be subjected to the duties and liabilities defined by the common law in reference to mere inanimate chattels, or whether he should be regarded as a special agent for transportation, bound only to furnish suitable and safe carriage and motive power, and responsible only for the defects in these, in the absence of a special contract, can scarcely be deemed a settled question. The principal authorities are collected in Wharton on Negligence, §§ 615-21. It would serve no good purpose to extend this opinion by undertaking to review them.

A common carrier is in the exercise of a public employment, and has public duties to perform. When he has a regularly established business for the carriage of all or of certain articles, and as is said by the supreme court of the United States in the recent case of *R. R. Co. v. Lockwood, supra*, "especially if that carrier be a corporation created for the purposes of the carrying trade, and the carriage of articles is embraced within the scope of its chartered powers," it is a duty he owes the public

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to receive all freight offered him not without the line of his employment, and safely to transport it at reasonable charges. 1 Smith's L. C. 315; Ang. on Carriers, § 124; *H. L. S. H. Co. v. Merchants' Bank*, 6 Hurd. 344; Edw. on Bailments, 443; 1 Chit. Con. 684-87; Redf. Railways, § 138. The rules of the common law prescribing his duties and fixing his liabilities are intended for the protection of the public, and it would offend the public policy, in which these rules have their foundation, if they were not extended so as to embrace every species of property which becomes the subject of transportation by carriers. The carrier voluntarily assumes the employment because of the profits expected to flow from it, and the rights and remedies the law affords him to secure these profits. He can demand his compensation when the thing is offered him for transportation, and may refuse to receive it unless it is paid. Ang. on Carriers, § 124. If without demanding freight in advance he carries the goods, the law gives him a lien on them for the reasonable price of their carriage, and he may detain them until it is paid. Edw. on Bailments, 547.

These are rights attaching to every species of property he may assume to carry, and the corresponding duty and liability the law fixes on him should also attach. We prefer, therefore, to follow the authorities, which hold that unless modified by special contract, "the common law liability of a carrier for the delivery of live animals is the same as that for the delivery of merchandise. Upon undertaking their transportation he assumes the obligation to deliver them safely against all contingencies, except such as would excuse the non-delivery of other property." *Smith v. N. H. & N. R. R. Co.* 12 Allen, 531; *Squire v. N. Y. Cent. R. R. Co.* 98 Mass. 239; *White v. Winnisimmet Co.* 7 Cush. 155; *Wilson v. Hamilton*, 4 Ohio St. 722; *Hall v. Renfroe*, 3 Met. (Ky.) 51; *Kansas R. R. Co. v. Nichols*, 9 Kan. 235; *Kimball v. R. & B. R. R. Co.* 26 Verm. 247; *Palmer v. Grand Junction R. R. Co.* 4 Mees. & Wels. 748.

The common law admits a qualification of the carrier's liability dependent on the nature of the thing to be carried, and the extent of his custody and control over it. He was never liable for losses resulting from the perishability of the thing transported, from its ordinary deterioration in quality or quantity, or from its inherent infirmity and tendency to decay. Ang. on Car. § 210; Story on Bail. § 492. He was bound to take reasonable care of perishable goods, so that as little loss as possible should result from their infirmities, but observing this, he was not responsible for damages resulting from their nature. Slaves—as to the title of the owner, his power of disposition—were chattels; yet a carrier of them was not subjected to the liability imposed on him in the carriage of inanimate

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chattels. The liability incurred was measured by the nature and character of the slave, as a human being, and assimilated to that assured to passengers. *Boyer v. Anderson*, 2 Pet. 150; *Williams v. Taylor*, 4 Port. 234. Adopting the language of Wharton: "Live animals have the power of voluntary motion, and have in them qualities of disturbance and perishability which cannot be determined until they are tried by this particular mode of conveyance. The quietest ox may be possessed by a frenzy of passion when placed in a freight car with the engine screaming ahead of him, the boards shaking underneath him, and the train rumbling and jerking behind. Even strength and endurance, in stiffening the brute system to a mere continuously excited bracing up against the motion, may prove a greater hinderance to safe travel than the supple weakness which yields helplessly to the jar. There are features, therefore, of 'live-stock' which take them out of the category of 'goods.'" Wharton on Negligence, § 615. They may die or deteriorate in value from refusing food or water, or from disease which may be aggravated by the mode of conveyance, or the length of the journey. A carrier who has observed all proper care and foresight to avoid loss and injury, would not be chargeable if it resulted from the nature of the animal, on the same principle that he is exempted from liability for the deterioration or decay of perishable goods. The measure of liability must be modified or varied, so as to be adapted to the nature of the thing to be carried. *White v. Winnisimmet Company*, *supra*; *Hall v. Renfro*, *supra*; *Penn. Buffalo & Erie R. Co.* 29 N. Y. 204; Ang. on Carriers, § 214; 2 Redf. Railways, § 168, and notes. There may be cases in which the thing carried is not surrendered into the custody and care of the carrier, but the owner accompanies and retains possession of it. In such case the liability of the carrier is more restricted, and the owner is bound to use all reasonable diligence to prevent loss or injury. *White v. Winnisimmet Co.* *supra*; *Wilson v. Hamilton*, *supra*; *Brind v. Dale*, 8 Car. & P. 207. In all cases of this kind, keeping in view that the law casts the *onus probandi* on the carrier, the cause of the loss is a matter to be determined by the jury on the evidence before them.

In the absence of a special contract, on the carrier transporting live-stock would devolve the duty of watering, feeding, and bestowing other care, which from their nature and condition they require. By special agreement, the owner or agent may be placed in charge of them, and this duty transferred to him. When the stock is transported under such special agreement, if the carrier provides adequate carriages, affords reasonable and proper opportunities to the owner or agent to care for the stock, subjects them to no unnecessary or unreasonable delays

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in transportation, he cannot be held responsible for loss or injury resulting from the want of food, water, or other care. Wharton on Neg. § 618.

As we have said, a common carrier may, by special contract with the shipper, limit his common law liability, but no limitation can relieve him from liability for loss or injury resulting from his own negligence. Such a limitation would be adverse to the policy of the law, fixing his liability, and cannot be regarded as just and reasonable, when the relative position of the carrier and shipper is considered.

The stipulation in the special contract, by which the owner assumed the duty of watering, feeding, and caring for the stock, at his own expense, is valid, and for loss or injury resulting from a want of attention in this respect, the carrier is not liable if he was not wanting in the diligence the law required of him,—if he furnished adequate carriage, afforded reasonable opportunities to the owner, or his agent, to care for the stock, and subjected them to no unnecessary delay in transportation.

The stipulation that the carrier should not be liable, in consequence of the weakness of the animals, or of injury they inflicted on each other or themselves, or, in consequence of fright or viciousness, is but a stipulation against liability, because of the nature of the thing carried, and does not materially differ from the rule of law, in the absence of a special contract. The facts of this case do not require us to express any opinion on some other exceptions from liability, with which these are connected.

The general exception that the carrier shall not be liable for any "*other damages incident to railroad transportation, which shall not have been caused by the fraud or gross negligence of said railroad company,*" if it is to be construed as relieving the company from the degree of care and negligence exacted by the common law would be unjust and unreasonable, and could not be maintained. From that care and diligence he cannot be released. The limit to which he may contract for exemption is freedom from liability for damages, not arising by his own or his servants' negligence. Any want of the diligence they are bound to observe is negligence. *Sager v. P. & S. & P. E. R. R. Co.* 31 Me. 228.

When a carrier relies on a special contract, on the court rests the duty of pronouncing, in view of all the circumstances attending it, whether it is just and reasonable. 1 Chit. Con. 692. We have had much difficulty in determining the validity of the stipulation in the contract, that if loss or injury should occur, for which the company is liable, the amount claimed should not exceed fifty dollars for any one of the ani-

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mals. If the measure of the liability thus fixed appeared to be greatly disproportionate to the real value of the animal, and the amount of freight received, we should not hesitate to declare it unjust and unreasonable. But as the case is presented, it seems to have been intended to adjust the measure of liability to the reduced rate of freight charged, and to protect the carrier against exaggerated or fanciful valuations. We cannot therefore pronounce it unjust and unreasonable, and it is the measure of appellant's liability. 2 Redf. Railways, § 161; *Squire v. N. Y. Cent. R. R. Co.* 98 Mass. 239; *Farnham v. Camden & Amboy R. R. Co.* 55 Penn. 53.

We do not intend to depart from the ruling of this court in *S. E. Co. v. Crook*, 44 Ala. 468, on this point. That decision we do not doubt is correct, and it is not in conflict with the authorities to which we have referred, nor with the view we have expressed. It was clear in that case the term *package*, employed in the special contract, had no reference to *bales of cotton*, the things carried, and for the loss of which the carrier was held liable. There is in this case a special contract in reference to the things which are the subject of transportation, based upon a sufficient consideration clearly expressed, — a reduced rate of freight, and fixing the maximum of the carrier's liability, in the event of loss or injury. This maximum does not appear to be grossly disproportionate to the value of the animal lost. For any greater measure of liability the shipper did not pay freight.

Without noticing separately the several charges refused, which are the subject of exception, an application of the rules asserted will enable the circuit court to dispose of the case correctly. The judgment is reversed and the cause remanded.¹

MANNING, J. — I am unable to assent to the decision of the court upon the last point presented in the opinion of the chief justice. It seems to me that a railway company ought not to be allowed to stipulate, in such a case as the one before us, for exoneration from a portion, any more than from the whole of a loss which is caused by its negligence, or that of its employees. Public policy requires that the principle involved in this matter should be kept as free as possible from qualification. And the rule arising out of it ought to be so sharply defined and steadily upheld, as to discourage all endeavors to avoid it, or to escape from its control.

It is not necessary to express any opinion in respect to the question whether the evidence in this cause shows that the

¹ This case was decided at the January term, 1875, but was in use by the court when the opinions of that term were being printed.
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railroad company, or its agents were, in truth, guilty of any negligence or misconduct, on the occasion out of which this suit arose. That was a matter of fact to be determined by the jury.

Nor must it be supposed that I hold it to be unreasonable or unlawful for common carriers to stipulate that they shall not be responsible for extraordinary values, not made known, put upon horses, dogs, or cattle, on account of qualities not obvious to casual inspection,—such as great speed, fine pedigree, or the like, which give to them exceptional value for the turf, to breed from, or for other purposes. Animals of this sort afford opportunities for those “extravagant and fanciful valuations” mentioned in a case cited on behalf of appellant. And the stipulation of the carrier that he shall not be subject to such valuations, upon a contract for the transportation of them as ordinary animals of their kind, is authorized by the same principle which allows him to make a like stipulation in respect to the unknown value of goods in packages. Indeed, the principal case which has been referred to as a precedent for such a contract as that under consideration was a contract of that sort.

A gentleman going from London by railway into the country took along two horses and a dog, for which he paid fare and took a ticket, annexed to which was a condition, or special contract, signed both on his behalf and that of the company. In it was this stipulation: “The company will not be liable in any case for loss, or damage to any horse or other animal, above the value of £40, or any dog above the value of £5, unless a declaration of its value signed by the owner, or his agent, at the time of booking the same, has been given to them. . . . If the declared value of any horse or other animal exceed £40, or any dog, £5, the price of conveyance will, in addition to the regular fare, be after the rate of 2 per cent. or 6*d.* in the pound,” &c. In the course of the journey the dog escaped through a window, and was lost to the owner. And the owner brought suit against the company for £21, the value of the dog, in the court of queen’s bench. In that court, the decision was against the company. COCKBURN, C. J., said: “I think it right at the outset to say that upon the facts stated in this case, we should not be justified in drawing the inference that there was actual negligence on the part of the company. My judgment proceeds upon the ground, that the ticket by which the company proposed to convert their common law contract into a special one, is void,” &c. BLACKBURN, J., agreed with him. On appeal to the exchequer chamber, it was held there also, that there was no negligence on the part of the company; but a majority of the judges held

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that the stipulation was valid. *Harrison v. London, B. & S. C. R. Co.* 2 Best & Smith, 122 & 151.

In this case, it will be observed that the contract was like that which express and railroad companies frequently make respecting goods in packages, in regard to which the common carrier may limit his liability to a certain sum, unless the owner will declare the value, and pay freight for it accordingly.

But the cattle transported under the contract we are considering were such as are usually conveyed to market to be sold as beeves. They were, obviously, to be appraised as such. The owner or shipper of them did not at any time claim that he should be allowed a higher price for any of them than stock of that kind would fetch in the market. And to them, the observations are applicable, which were made by PECK, C. J., in the *Southern Express Co. v. Crook*, 44 Ala. 468.

In that case, it was argued that if the company was liable at all, the receipt it gave for the bales of cotton, about which the controversy arose, limited responsibility to fifty dollars per bale. Speaking of goods contained in packages, which prevented any judgment in respect to their value, Judge PECK said: "In such cases, there would seem to be great propriety in having their value named, to enable the carrier to make a charge answerable to the responsibility he would assume, and at the same time, inform him of the care required to be taken of them. . . . But where the appearance of the article itself indicates its value, and advises the carrier of the care usually taken in the transportation of such articles, the necessity of having its value stated is not perceived. In such cases the carrier is liable, although nothing is said by the shipper about their value;" meaning, of course, in a case in which the receipt or contract requires, as in that case it did, that if the shipper did not declare the value, it should not be assessed at a higher sum than that specified in the instrument. For, there would be no occasion to say, if the carrier was liable at all, that he would be liable for the value of such articles, if the contract did not restrict the liability. Judge PECK proceeded to say: "It may, no doubt, be safely said that the value of cotton is as well, and perhaps, as a general thing, better known to the carrier than to the shipper. Its value depends upon the public markets, the knowledge of which is open alike to both parties; there is, therefore, no real danger that any deceit or fraud will, or can be practised upon the carrier." The same is true in respect to beef cattle, as well as to cotton. The next paragraph in the opinion quoted from indicates that Judge PECK inferred that the stipulation in the instrument under consideration was not intended to embrace bales of cot-

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ton. But the observations quoted present good reasons why such a contract should not be allowed, in respect to such articles, to be valid.

In other respects, and as transportable goods, cattle differ, of course, very much from bales of cotton. Being "live-stock," they are, when crowded together and conveyed on railway cars, liable to perish from hunger, to be suffocated, to become frantic from pain or fright, to be gored or trampled to death, or otherwise killed or hurt. The law, therefore, allows railway companies to stipulate with the owner or shipper, in consideration of reduced rates of freight to be paid by him, that he shall undertake to send a messenger along to feed and take care of them, and assume the risk of all losses that may result from such causes of destruction or disaster as inhere in the nature of the things carried, without negligence or misconduct on the part of the carrier. All this has been sufficiently explained in the opinion just read in this cause, and is almost in harmony with the common law on the subject.

But in my opinion the condition or agreement in this contract, that if losses happen by causes for which the company shall be responsible, as by negligence or misconduct on the part of its employees, — it shall be chargeable only according to the value of the cattle at the place of shipment, *and in no case, with more than fifty dollars for any one of them*, is not justified by the law relating to common carriers.

Of this term of the contract it is to be remarked that it does not at first seem to be unjust. It rather strikes the mind as being equitable. It is, however, more specious than fair. Fifty dollars a head may be nearly a true average value of a car-load of cattle. But the company does not agree to pay that sum for any one without respect to value, that may be killed by reason of its negligence or that of its servants. It will pay for the loss of an inferior animal no more than it is worth, though this be only twenty or twenty-five dollars. And if the animal killed be worth \$80⁰⁰ or \$100⁰⁰, the company will not pay for it more than \$50⁰⁰. The ox which is the subject of this controversy (according to the evidence) weighed between 1600 and 1700 pounds, and was worth from six to seven and a half cents per pound. The jury assessed the damages for it at \$75⁰⁰. And it is insisted that, in pursuance of the special agreement, the railroad company must not be required to pay more than two thirds of this sum.

Ought such a contract to be upheld by the courts? If the sum mentioned in the contract is to be the *maximum* of liability, it ought also to be a *maximum* value, — that is, the value of one of the best of the cattle conveyed, — else it seems to me the contract is unequal and unjust. And yet a contract with

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such a fair *maximum*, in respect to the carriage of such kinds of property, would be equivalent only to one without any limitation of liability at all; and, therefore, there ought not to be any.

True, the old rules of the common law in respect to common carriers have been much relaxed. And this has been effected mainly through the allowance extended by the courts to notices given and contracts made from time to time by common carriers with persons in need of their services. Some of the alterations thus brought about were doubtless justified, perhaps required, by the great changes which have taken place in the methods of commercial intercourse, and in the condition of society. But we sometimes see also expressions of judicial regret at the extent to which courts have gone in emancipating that important class of agents from the strict obligations to which a high public policy subjected them. And it is very probable that the powerful corporations that have almost monopolized, of late, the business of common carriers, have had great influence in accomplishing that result.

An eminent English judge, referred to by Judge BRADLEY, in his very able and masterly opinion in *Railroad Co. v. Lockwood* (17 Wall. 357), said in 1863, that the cases decided in the English courts, "between 1832 and 1854, established . . . that a carrier might, by a special notice, make a contract limiting his responsibility, even in the cases here mentioned of gross negligence, misconduct, or fraud, on the part of his servants;" and "that it seemed to him that the reason why the legislature intervened in the railway and canal traffic act of 1854, was because it thought that the companies took advantage of those decisions (in Story's language) 'to evade altogether the salutary policy of the common law.'" Thus the parliament of England had to come to the aid of the courts to hold those great companies in check. *Peck v. No. Staf. R. R. Co.* 10 Ho. of Lds. Cases, 473.

The act of parliament referred to authorized the judges of the courts to decide upon the reasonableness of stipulations in a contract for carriage of goods, and to allow such stipulations or declare them void, accordingly.

In this country, likewise, — in the State of New York, especially, and in some other states, — the courts have yielded too much ground under (probably) a like pressure. Eminent and estimable citizens are presidents, directors, engineers, and stockholders in these corporations, and naturally desiring for them the largest privileges and immunities, impress their own views upon persons in authority. The ablest counsellors and advocates in the legal profession are retained as advisers of these institutions. Whenever a point is gained, it is secured and

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made available by being immediately put into their notices and contracts. And there are few courts of any eminence, in which it has not been complained of as unwarrantable tyranny, to hold that free citizens may not validly make with these corporations any contracts which they may mutually agree upon relating to the transaction of their own business.

"It is a favorite argument" (says Justice BRADLEY) "in the cases which favor the extension of the carrier's right to contract for exemption from liability, that men must be permitted to make their own agreements, and that it is no concern of the public on what terms an individual chooses to have his goods carried." "But" (he asks) "is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such, that it places it in their power to change the law of common carriers, in effect, by introducing new rules of obligation.

"The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higggle or stand out and seek redress in the courts. His business will not admit of such a course. He prefers rather to accept any bill of lading, or sign any paper the carrier presents, — often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this, or abandon his business."

These observations were made by Judge BRADLEY, in a case in which suit was brought against a railway company for the death, by the fault of its servants, of a person who was travelling upon a free ticket, as a messenger in charge of live-stock transported, as in the cause before us, in railway cars; in which ticket it was stipulated that the company should not be liable for any accident or disaster that might happen to him. And Judge BRADLEY, by his thorough examination into, and clear exposition of the obligations upon railway carriers in this opinion, and the supreme court of the United States in unanimously concurring in and acting upon the views he presents, have rendered a signal service to the whole country, and established positions for the control of such companies which the other courts of the land ought resolutely to maintain.

The supreme court of Alabama has not gone astray on this subject. In *Steele & Burgess v. Townsend* (37 Ala. 247), a case of transportation by sea of hollow cast-iron ware, it was held that although a common carrier might by special contract limit his liability in respect to goods of a perishable nature, or easily damaged, yet the character of common carrier was not

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thereby put off, — as had been held in some courts of high authority. “When, therefore” (said R. W. WALKER, J.), “a carrier, as in this case, provides against accountability for ‘rust or breakage,’ the proper construction of the exception is, that the carrier is not to be held liable as an insurer for ‘rust or breakage’ which occurs *without negligence on his part*; but that he remains, as before, responsible for any injury of the kind mentioned, if caused by his failure to exercise the degree of care which the law demands of every common carrier in respect to the goods committed to him.”

To the same effect is the decision in *Mobile & O. R. R. Co. v. Jarboe* (41 Ala. 644), in which it is held: “A common carrier may legally contract for exemption from that responsibility imposed by the common law, by which he becomes an insurer. But on grounds of *public policy*, he cannot go farther than this in the limitation of his liability, by special contract.”

In *Mobile & O. R. R. Co. v. Hopkins* (41 Ala. 486), the plaintiff below was a passenger with a free ticket, on which was this stipulation: “The person accepting this free ticket, *in consideration thereof*, assumes all risk of accident, and expressly agrees that the company shall not be liable under any circumstances, whether of the negligence of their servants or otherwise, for any injury to the person or property.” The company was sued for the value of the baggage of this passenger, lost (as it was charged) by the negligence of its servants. The court said: “Railroad companies are incorporated, in part at least, from public considerations, and for the public good. As carriers of persons and property, it has been held they may be considered as acting in a public capacity, and as a kind of public officer. *The exercise of honesty, care, and diligence* by them, their agents, and employees, is a *public duty* resulting from their position, the obligation to perform which *cannot be thrown off by contract*. If thus thrown off, the effect would be to relax, or modify the performance of the duty, and to promote the relaxation of proper care in the selection of agents and servants for its performance.” It was, therefore, held that the company was bound to pay the value of the lost baggage.

And in *Southern Express Co. v. Crook*, *supra*, this court held that although the liabilities of common carriers “may be reasonably limited by special contract, public policy will not permit a common carrier in this way to be exempted from damages for losses occasioned by the negligence or misfeasance of himself or his servants.”

This is the doctrine of almost all of the American courts. A leading case affirming it is that of the *New Jersey Steam Nav.*

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Co. v. Merchants' Bank, 6 How. U. S. R. 384. And it is recognized to be law, in the opinion just read by the chief justice in this cause. Indeed, it is one of the few rules that remain, which is almost universally acknowledged in this country to be binding on common carriers, and yet is the subject of continual assaults. It ought, therefore, to be maintained and enforced with a firm hand, rather than frittered away by plausible exceptions and modifications.

A case precisely parallel with the present, in the matter now under consideration, has not come under my observation; that is, a case of limitation of liability to a sum less than the value of the property involved, when such value is easily judged of, and the property open to view, and the loss of it is caused by the misconduct or negligence of the company's servants.

The case most nearly like it in these aspects is that of *The Southern Express Co. v. Crook*, *supra*. The decision in it was the same that the rule contended for would have produced, and the argument supports the rule; though it is not clear that the decision is not founded in part upon the idea, that the clause of limited liability in that case was not intended to relate to bales of cotton, as much as upon the purpose of holding it void, if it was intended to embrace them. Still it is an authority for the latter proposition.

True, it is said in *Squire v. N. Y. Central R. R. Co.* (98 Mass. p. 245), "The stipulation that they should not, under any circumstances, be held liable beyond the sum of \$200, for injury to, or loss of any single animal, was a proper and lawful mode of securing a due proportion between the amount for which they might be responsible and the freight which they received, and of protecting themselves against extravagant and fanciful valuations." But this term of the contract was not then before the court for adjudication. The animals transported were hogs, no one of which was worth, perhaps, one fourth of the sum prescribed. And the court, besides, held that the death of many of them by suffocation was attributable to the negligence of the person in charge of them for the shipper, instead of that of the railroad employees, for which reason the company was not liable for them at all. Moreover, the authorities cited in support of the *dictum* quoted above, related either to animals that are sometimes called "fancy stock" (the dog before referred to), or to commodities in packages which prevented the carrier from judging of their value, and charging for them accordingly.

If railway companies may, by fixing a high tariff of rates, coerce shippers, in consideration of reduced charges, to accept one third less, as in this case, than the value of the property, the character and general value of which are obvious to in-

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spection, that may be destroyed by the negligence of the carriers' agents, the principle is seriously broken in upon. Why may they not in the same manner and in like cases, coerce shippers to abate forty *per cent.* or fifty *per cent.* from the value, or release the companies entirely? And why may not such a stipulation be made in respect to other products, — for instance, cotton in bales, — as well as to cattle?

In *Maving v. Todd* (1 Stark. R. 72), involving a similar question, "Holroyd submitted whether the defendants could exclude their responsibility altogether. This was going further than had been done in the case of carriers, who had only limited their responsibility to a certain amount.

"LORD ELLENBOROUGH: Since they can limit it to a particular sum, I think they may exclude it altogether."

Subsequently he said: "I am sorry the law is so, it leads to very great negligence."

What flaw or fault is there in the logic of Lord Ellenborough? The only way of preventing the regret hereafter which he has here expressed, is to be strict in preserving the rule in question unimpaired by clauses of restricted liability for losses occasioned by the negligence or misconduct of the carrier's servants, when the property carried is open to view and its general value easily estimated.

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1. *Action ; when cannot be maintained against county.* — Suit cannot be maintained against a county on a claim which has been audited and allowed without reduction. The only remedy is by *mandamus* to compel the levy of such tax, as the law permits to be levied, to pay the claim. (Overruling *Randolph County v. Baldwin*, 46 Ala. 367.) *Covington County v. Dunklin & Steiner*, 28.
2. *Same.* — Suit cannot be maintained against a county on a claim which has been audited and allowed without reduction. *Elmore County v. Long & Zeigler*, 277.
3. *Use and occupation ; when does not lie.* — A plaintiff in ejectment, put in possession as against a third person, cannot maintain an action for use and occupation against the tenant, by contract, of one who held the premises adversely to the parties to that suit — neither landlord nor tenant being parties or privies — although the plaintiff demanded rent of the tenant, who is not shown to have acquiesced in the claim, and thereafter made no effort to dispossess him. *Lankford v. Green*, 103.
4. *Ejectment ; when not maintained.* — A warranty deed, upon full payment of purchase-money, conveying to an administrator, as such, "in trust for the absolute use and benefit of such estate and those interested therein," lands his intestate had purchased and partly paid for, vests no such title in the heirs as will enable them to maintain ejectment against a purchaser at a sale by the administrator *de bonis non*, under order of the probate court. (Following and adhering to *You v. Flinn*, 34 Ala. 409.) *Pitman v. Corniff*, 83.
5. *Action ; what discloses no cause of.* — A complaint in trover by the husband alone for the conversion of property which is averred to be the statutory separate estate of his wife, discloses no cause of action in his favor. *Taylor v. Jones*, 78.
6. *Action on account or verbal contract.* — The first count as given in the form of complaint prescribed by the Revised Code for action "*on account or verbal contract*," is so vague and indefinite that it would not be admissible as the statement of a cause of action if it had not been prescribed by law. *Chickering & Sons v. Bromberg*, 528.
7. *Action to subject statutory separate estate.* — It is indispensable to the maintenance of a proceeding, under the Code, to subject the statutory separate estate of the wife, for articles of comfort and support of the household, &c., that the estate should have had an existence at the making of the contract, continuing up to the institution of the suit. *Pippin v. Jones*, 161.
8. *Ejectment ; what will support.* — The title of the heir to lands of the ancestor, sold by order of the probate court for payment of debts, is not divested until the administrator, in accordance with an order of court, conveys title to the purchaser, and without such title the purchaser cannot defend ejectment by the heir. *Doe ex dem. v. Hardy*, 292.

ACTION — *Continued.*

9. *Attorneys' fees ; when recoverable.* — Counsel fees incurred in defending an injunction suit in the chancery court and procuring its dissolution may be recovered in an action on the bond, conditioned according to § 3430 R. C., after the dissolution of the injunction. *Holmes v. Weaver*, 516.
10. *Action ; effect of repeal of statute authorizing suit against the State.* — Statutes permitting the State to be sued are mere matters of grace, conferring privileges, not rights which it may withdraw at pleasure. The repeal of the law authorizing suits against the State strips a court, in which such a suit is pending, of all jurisdiction to proceed further in the cause. *Ex parte State*, 231.
11. *Action by owner, against purchaser from stranger in possession, without title ; what necessary to defeat.* — A purchaser of a sewing-machine from one in possession, but without title, cannot defeat a recovery by the owner, unless he shows a *bona fide* purchase, for valuable consideration, without notice. *Sumner v. Woods*, 94.
12. *Trover ; when maintained.* — A mortgage by the wife of her statutory separate estate, to secure payment of her husband's debt, is void, conferring no title on the purchaser under it, and she, or her personal representative, may maintain trover against the purchaser for the conversion of property thus acquired. *Northington v. Faber*, 45.
13. *Joint tortfeasors ; how may be sued.* — Joint *tortfeasors* may be sued jointly or severally for a trespass, and if the *tort* be of such a nature as to authorize it, the injured party may bring trover against one, trespass against another, and detinue against a third, if his possession was obtained by the aid of the *tortious* acts of the others. *Dubose v. Marx*, 506.
14. *Same ; judgment against one, when no bar to suit against others.* — Judgment against one or more joint trespassers in either of these actions is no bar to a recovery against the others. Nothing short of a release, satisfaction, or something which the law deems equivalent to it, can operate a bar. *Ib.*
15. *Same.* — Where the injured party waives the *tort* and brings an action *ex contractu*, he estops himself from pursuing either of the trespassers for the *tort* ; but an action of detinue does not have that effect, for the reason that it is not an admission that the property sued for was not *tortiously* taken from the plaintiff, but rather implies the contrary. *Ib.*

ADMINISTRATOR. See EXECUTORS AND ADMINISTRATORS.

ADVANCEMENTS. See CHANCERY, 1 ; ESTOPPEL.

AGENCY.

1. *Agent, acts of one claiming to be ; when admissible against principal.* — The fact and scope of an agency being established, acts of one who was where the agent should have been, and exercising the authority he had, are competent evidence to enable the jury to determine whether such person was in fact the agent ; and the fact that this is controverted effects the weight, not the admissibility of the evidence. *S. & N. R. R. v. Henlein & Barr*, 606.
2. *Deputy sheriff ; authority of, to bind principal.* — The full or regular deputy sheriff is a general agent for the sheriff, and may be presumed to have authority to contract for, and charge his principal with the expense of feeding and keeping live-stock upon which the deputy has levied. Instructions limiting the authority of the deputy in this respect will not affect persons dealing with him, unless brought to their notice. *Ramsey v. Strobach*, 513.

ALIEN. See STATUTES, 3.

APPEAL. See ERROR AND APPEAL.

ASSURANCE, LIFE. See LIFE INSURANCE.

ATTACHMENT — GARNISHMENT.

1. *Attachment for rent ; what statute contemplates.* — The statute authorizing an attachment for rent contemplates a tenancy from year to year, springing out of contract. *Tucker v. Adams*, 254.
2. *Landlord's remedy for collection of rent ; who cannot pursue.* — The statutory provisions giving the landlord a lien on crops grown on the rented premises, and a remedy by attachment to be levied on the crop, &c., cannot be pursued by one to whom he transfers the rent note. *Foster v. Westmoreland*, 223.
3. *"Cause of attachment ;" what not issuable in attachment suit.* — The cause for which an attachment issues, which cannot be made an issuable fact in the attachment suit, is not the relation existing between the plaintiff and defendant, whether it be that of landlord and tenant, or that of debtor and creditor — nor it is the existence of the debt averred. *Tucker v. Adams* 254.
4. *Same.* — The cause of attachment is the state of facts averred as entitling the party to the remedy. In the case at bar, the cause of attachment was the removal from the rented premises of a portion of the crop without payment of rent, &c. That the crop had not been removed, could not be made an issue in the attachment suit. *Ib.*
5. *Attachment bond ; what breach of.* — The non-existence of the debt for which the attachment issues is a breach of the attachment bond, entitling the defendant to recover in a suit thereon the damages sustained. *Ib.*
6. *Garnishment ; what will authorize suggestion of adverse claim.* — A message to the garnishee from a third person that he "held" a note executed by garnishee, if not known to be a fraudulent pretence, authorizes the garnishee to set up such claim in the answer, or to amend it if already filed. *Fowler v. Williamson*, 16.
7. *Contest of answer ; when transfer not within issue.* — The garnishee waives the right to set up the interest of the transferee, and is liable to the plaintiff notwithstanding the transfer, if he fails to set it up in the answer ; and on contest of an answer which is a general denial of indebtedness, proof of such transfer is without the issue raised, and cannot be received. *Ib.*

BILLS OF EXCEPTION.

1. *Bill of exceptions ; what indispensable to.* — The signature of the presiding judge is indispensable to the validity of a bill of exceptions, and alone authorizes its incorporation in the record. *Rollater v. Rollater*, 111.
2. *Unsigned bill of exceptions, disregarded.* — The appellate court, *ex mero motu*, will disregard an unsigned bill of exceptions, although no motion is made to strike it out of the record. *Ib.*
3. *Same ; parties cannot dispense with signature of judge.* — Neither the written consent of parties, nor a joinder in error, can impart validity to an unsigned bill of exceptions ; and where parties knowingly submit a cause in this condition and the judgment below is affirmed, the affirmance will not be set aside and the cause reinstated upon the docket and a *certiorari* awarded to bring up a bill of exceptions, to be signed by the judge in pursuance of an agreement of the parties. *Kerley v. Vann*, 7.
4. *Bill of exceptions ; construction of.* — Where the bill of exceptions states that "the defendant requested the following charges in writing, which the court refused, and to the refusal of the court to charge as requested the defendant duly excepted," the ruling of the

BILLS OF EXCEPTION — Continued.

court below will be upheld, if any one of the charges requested is erroneous. *McGehee v. The State*, 224.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Bill of exchange, payee of; what does not show legal title out of.* — The mere indorsement of the payees' names in blank remaining on a bill of exchange, when introduced as evidence in a suit on the bill, does not show that the legal title was not in them. *Beeson v. Lippman*, 276.
2. *Same; action against acceptor; what not irrelevant evidence.* — In an action by the payees against the acceptor of a bill of exchange — no plea of *non est factum* being interposed — evidence that the acceptor acknowledged that he signed his name as acceptor, although unnecessary, is not irrelevant. *Ib.*
3. *Defences against transferee of note.* — It is a good defence to a suit by the transferee of a note given for land, that, before notice of the transfer, the money due thereon was deposited with a third person by request of the payee, to be paid to him on his conveying the land to the purchaser. *Eads v. Murphy*, 520.
4. *Variance; what not material.* — A note payable "by" the first day of November, 1870, to "John L. Dunham, ag't or bearer," may be properly declared on as payable to John L. Dunham "on" first day of November, 1870. *Preston v. Dunham*, 217.
5. *Promissory note; what sufficient consideration for.* — A promissory note given in consideration of a loan of Confederate treasury notes, made between citizens of this State during the late war, is supported by a sufficient consideration. *Wyatt v. Evins*, 285.
6. *Same.* — A compromise of matters in dispute and litigation between the parties is of itself a sufficient consideration, in the absence of fraud, to support a promissory note given in pursuance of the settlement. *Ib.*
7. *Same.* — A promissory note, executed by and payable to a party residing at the time within the Confederate lines, for a loan of Confederate currency, is supported by a valid consideration. (*Hale v. Huston, Sims & Co.* 44 Ala. 134, overruled.) *Whitfield v. Riddle*, 467.
8. *"Dollars," meaning of.* — The word "dollars" in such a note does not necessarily mean dollars of the United States, but the contract must be read in the light of surrounding circumstances to determine in what currency it was solvable. *Ib.*
9. *Same; measure of recovery.* — In an action since the war on a note payable during the war, given in consideration of the loan of Confederate currency, and intended to be discharged in "dollars" of that currency, the measure of recovery is the value of the currency at the time of the loan. *Ib.*
10. *Suretyship; what does create presumption of.* — The order in which the makers sign a promissory note, of itself raises no presumption of the relation of principal and surety between them; as between themselves, this may be shown by parol, but not to the prejudice of a stranger unless he had notice. *Summerhill v. Tapp*, 227.

BONDS. See MANDAMUS, 1, 2, 4, 5; CONSTITUTIONAL LAW, 14.

BRIDGE. PUBLIC.

1. *Public bridge; what will not authorize destruction of, by private person.* — The worthless and decayed condition of a public bridge, erected by authority of law, or the peril attending its crossing, will not authorize its destruction or injury by one not suffering particular annoyance or injury. *Owens v. State*, 400.
2. *Same.* — If a public bridge, in its original construction and condition, materially impedes the free navigation on a stream which is a public

BRIDGE, PUBLIC — *Continued.*

highway, that fact may be shown in defence by a person who destroys the bridge to allow passage for his raft. *Owens v. State*, 400.

CARRIER. See **COMMON CARRIER.**

CHANCERY.*I. Jurisdiction.*

1. *Jurisdiction to decree account of advancements.* — A court of chancery taking jurisdiction of an administration, may, when a distribution to heirs or next of kin becomes necessary, decree an account of advancements and exercise the jurisdiction conferred by statute on the probate court. *Key v. Jones*, 238.
2. *Decree for heir's share without refunding bond; when proper.* — It is not erroneous to decree an heir his share of a particular fund in the hands of an administrator, without exacting a refunding bond before coercing payment, when the administrator shows by his answer no reason why it is improper, and it appears that the estate is solvent, that all the other heirs have received their share, and there is no allegation of outstanding indebtedness. *Wright v. Chambers*, 444.
3. *What order has not jurisdiction to make.* — The chancery court has no jurisdiction to render a decree against one not a party to the suit, and connected with it merely as *prochein ami*, for the amount bid by the complainants for lands sold under order of the court, and reported as paid by the register, who, under agreement of parties, had accepted the draft of the *prochein ami* in satisfaction of the bid. Execution issued on such a decree is void. *Moore v. Randolph*, 530.
4. *Bill; when contains equity.* — A bill by the heir-at-law, to recover his share of a particular fund in the hands of the administrator of a solvent estate, is defective if it seek relief as to that fund only, and not a final settlement and distribution also. Such a bill, however, is not without equity, and if not assailed for its defects in the court below, the objection cannot be raised in this court. *Ib.*
5. *Set-off, bill to enforce; when without equity.* — A bill filed by the holder of a debt due from the intestate to obtain the benefit of a set-off in equity against a debt due the administrator of an insolvent estate, is without equity unless it shows that such debt has been duly filed and proved against the insolvent estate within nine months after the declaration of insolvency. *Walker v. Tyson*, 593.
6. *Same.* — A surety cannot come into equity to enjoin the execution against him merely because the sheriff refuses to make the money out of the principal, although sufficient property, which he is "fast making away with," has been pointed out to the sheriff. There is an adequate remedy at law. *Ib.*
7. *Same.* — The fact that an administrator, to whom a note was due, knew or connived at the purpose of the principal not to defend the suit, with the view that the surety, who depended on the principal to make defence, would thereby be misled and fail to appear, is not such an excuse for the failure to defend at law as will enable the surety to come into equity to enjoin the judgment; especially is this the case when the surety has been once deceived by the principal as to the debt's having been paid. *Ib.*
8. *Legislative franchise; when equity will not enjoin invasion of.* — A court of equity will not interfere to prevent the invasion of a grant or franchise, before the establishment of the right at law, even where it is derived from an act of the legislature, if upon an inspection of the statute a reasonable doubt exists as to the power of the legislature to enact it. *Moses v. Mayor*, 198.
9. *Injunctions; never granted except in cases of a civil nature, strictly.* —

CHANCERY — *Continued.* JURISDICTION — *Continued.*

As a general rule, courts of equity cannot interfere to stay proceedings in criminal matters, or in any case not strictly of a civil nature, nor to arrest the authorities charged with the execution of criminal laws, whether the prosecution be for violations of state laws, or for the infraction of municipal ordinances. *Moses v. Mayor*, 198.

10. *Bill of peace; when allowed.* — A bill of peace will lie only when the right claimed affects many persons; if the right is disputed between two persons only, not for themselves and all others in interest, but for themselves alone, the bill will be dismissed. *Ib.*
11. *Appointment of receiver; pendency of suit essential to authorize.* — The filing of the bill is the commencement of the suit in chancery, and until suit is thus commenced the court of chancery has no authority to appoint a receiver. *Moone v. Crowder*, 221.
12. *Distribution; when equity will decree direct without administration.* — Courts of equity will dispense with administration and decree distribution direct, when the only office of administration if granted would be distribution. *McLemore v. Fretwell*, 124.
13. *Set-off; what proper subject of.* — An heir sold certain cotton belonging to the Alabama estate to a third person who was to ship and sell it in New York. On its arrival there it was seized on legal process by the New York administrators. In a compromise with the purchaser, who threatened litigation, the New York administrators retained the cotton and paid the purchaser a sum of money on the heir's request to do so "and charge him in their administration account with the amount." It did not appear whether the New York administration had ever been settled, or whether there were any outstanding debts: *Held*, 1st. That the domiciliary administrator could not set off the sum paid by the New York administrator against the heir's claim to a share of the fund here. 2d. If equitable circumstances existed warranting the administrator here in making the charge, he could obtain relief only on cross-bill filed for that purpose. 3d. Mere unliquidated damages arising out of a *tort* cannot be the subject of a set-off in equity. *Chambers v. Wright*, 444.
14. *Injunction.* — In equity, a sale of decedent's lands made under a void order of court will be treated as valid as to those who have knowingly received the fruits of it and treated it as assets; and the court of chancery, at the instance of the purchaser, or one claiming under him, to whom the administrator and heir had conveyed the legal title, will prevent by injunction the cloud on the title, caused by a second sale by the administrator *de bonis non* under an order of the probate court. *Bell v. Craig*, 215.
15. *Equitable mortgage; how created and enforced.* — An equitable mortgage of personalty, enforceable in a court of chancery, may be created by verbal agreement. The party seeking to establish such a trust must prove its existence by clear and convincing proof. Casual and indefinite expressions will not suffice. *Shelburne v. Letsinger*, 96.
16. *Appeal and supersedeas; decree during void.* — When a cause is pending in the supreme court on appeal from a moneyed decree, in which the appellants executed a good and sufficient *supersedeas* bond, decrees made by the chancellor affecting the equities and rights of the parties are void for want of jurisdiction. *Moore v. Randolph*, 531.

When injunction will not lie to prevent governor's appointee from taking office. See *Beebe v. Robinson*, 66.

II. *Pleading and Practice.*

17. *Amendments.* — Under our liberal statute of amendments, the chancellor, on sustaining a demurrer, should not dismiss the bill without first allowing an opportunity to amend. *Little v. Snedecor*, 167.

CHANCERY—Continued. PLEADING AND PRACTICE—Continued.

18. *Account; when may be stated without reference.*—When the amount is not in controversy, and nothing remains but a calculation of interest, the chancellor may, in his discretion, state an account without a reference to the register. *Chambers v. Wright*, 444.
19. *Demurrer, hearing of; to what confined.*—Since the adoption of section 3330 of the Revised Code the court is prohibited from hearing a demurrer to the bill for any cause not specially set forth. *Ib.*
20. *Demurrer for non-joinder of defendants; when properly overruled.*—A demurrer for non-joinder of parties defendant which does not specify those who should have been joined is rightfully overruled. *Ib.*
21. *Distribution, bill for; parties to.*—A citizen of Georgia, possessed of assets here, died intestate in that State, several children surviving her there. Subsequently one of the children, a son, died leaving children. No administration was had upon his estate, and there were no debts against it. Administration was had here upon the first intestate's estate, but none in Georgia. There were no debts in either State. By the laws of Georgia an intestate's personalty is distributed to the widow and children in equal parts: *Held*, 1st. The distributees and the children of the deceased distributee might well join as complainants in a bill seeking an account and settlement of the administration here and a distribution. 2d. The bill was not demurrable for want of necessary parties complainant, because the administrator of the deceased distributee and the administrator of the intestate were not made parties. *McLemore v. Fretwell*, 124.
22. *Election between suits at law and in equity; not compelled before answer.*—It is error to compel the complainant to elect between an action at law, and the prosecution of his suit in chancery, before he has had the benefit of defendant's answer. *Dunlap v. Newman*, 178.
23. *Interest; when allowable in equity.*—As a general rule interest is always allowed in equity whenever it would be recoverable at law. A party complaining of the allowance of interest must show the special circumstances which render it improper. *Chambers v. Wright*, 444.
24. *Notice to interested parties; when may be dispensed with.*—Except in very special cases, where irreparable injury will result from delay, necessary and interested parties must have notice and an opportunity to be heard before the order appointing a receiver is made, and on appeal it will be a fatal objection to an order made without notice, that the necessity dispensing with it does not appear. *Crowder v. Moore*, 220.
25. *Partnership; bill for settlement of.*—A bill for account and settlement of partnership affairs, praying that land alleged to have been purchased by one of the partners, &c., be decreed partnership assets, &c., should set forth by appropriate allegations the contract or agreement of partnership, and the agreement and facts concerning the purchase of the land, so as to enable the court to judge whether the partnership was in reality formed, and to see without doubt that the land purchased was to be partnership property. *Little v. Snedecor*, 167.
26. *Repugnancy between bill and exhibits.*—When it is alleged that the copartnership was formed at a given time in a certain year, when each of the partners contributed, as capital stock of the firm, the amounts respectively shown by an exhibit, which does not show any such contributions at the time stated, but consists merely of a statement in figures of various sums of money as having been contributed, by the parties respectively, for a series of years, beginning after the designated year, there is a repugnancy between the allegations and exhibit. *Ib.*
27. *Multifariousness; what bill not demurrable for.*—A bill filed by creditors of the husband against the personal representative of the hus-

CHANCERY — *Continued*. PLEADING AND PRACTICE — *Continued*.

band and wife, and their children and distributees, and also against two insurance companies, in each of which the husband's life was insured for the benefit of his wife and children, charging that he had paid therefor more than five hundred dollars annually out of his own funds, &c., and praying for an account, and that the excess of insurance paid for by annual premiums over five hundred dollars be decreed liable for the satisfaction of debts and distributed accordingly, is not multifarious. *Knickerbocker Life Ins. Co. v. Stone*, 589.

28. *Multifariousness* ; who can raise objection on ground of. — A bill may be multifarious as to one or more defendants without being so as to others, and only those defendants as to whom the bill is multifarious can avail themselves of an objection to it on that ground. *Ib*.
29. *Partial decrees condemned*. — Partial decrees, parcelling out a fund in controversy to one or two of several claimants at one term, and to other claimants at another term, and so on, are dangerous departures from correct practice, and virtually deprive a party complaining of error of all benefit of appeal. *Moore v. Randolph*, 530.
30. *Preponderance of testimony* ; when does not control decree. — In ascertaining the existence of facts from conflicting evidence, the chancellor is not necessarily governed by the preponderance of the testimony. The material inquiry for him is, whether the evidence generates in his mind a clear and rational belief of the existence of the fact affirmed, essential to relief sought or the defence interposed. *Marlow v. Benagh*, 112.
31. *Sworn answer* ; effect of as evidence. — When the answer is verified as required by the bill, it operates, so far as responsive, as evidence for the defendant, and must prevail unless disproved by two witnesses, or by one witness with corroborating circumstances. *Marshall v. Croom*, 554.
32. *What raises no question as to amendable defects*. — To assign as cause of demurrer to the bill that "it contains no equity," is not a compliance with § 3330 R. C., and raises no question as to any amendable defect. *Chambers v. Wright*, 444.

CHARGE TO JURY.

1. *Written evidence* ; authority of court to charge upon effect of. — The authority of the court to charge upon the effect of evidence consisting wholly of depositions, is no greater than where the testimony is delivered orally. *Luke v. Calhoun Co*, 115.
2. *Charge upon effect of, when erroneous*. — Although the jury believe evidence, which is without conflict and tends strongly to prove the plaintiff's case, they should not be instructed to find for him, if they are authorized to make any deduction or inference which is fatal to his right of recovery. *Ib*.
3. *Charge to jury* ; what erroneous. — Where there is no evidence of a particular fact the court may so instruct the jury, but such a charge should rarely if ever be given without hypothesis. The giving of a charge that "there is no sufficient proof" of a particular fact will not be upheld when all the evidence is not set out and there is nothing to show that the charge was not an invasion of the province of the jury. *Lallouette's Heirs v. Lipscomb*, 570.
4. *What should be refused*. — A charge which is not applicable to the evidence, or calculated to mislead the jury, should be refused. *Northington v. Faber*, 45.
5. *Same*. — A charge not moved for in writing, or asserting several legal propositions, any one of which is incorrect, is properly refused. *Preston v. Dunham*, 217.
6. *Invasion of province of jury* ; what charge is. — In an action against a

CHARGE TO JURY — *Continued.*

carrier for failure to deliver goods intrusted to it for delivery at a particular place, the testimony being conflicting as to whether the goods had ever been so received, and whether freight had been paid on them, a charge *ex mero motu* that "if the jury believed, from the evidence, that the carrier received freight on the goods in question, that was sufficient evidence that the defendant had the goods in possession at that time," is an invasion of the province of the jury, and necessarily erroneous. *M. & G. R. R. Co. v. Williams*, 278.

See **PLEADING AND PRACTICE**, 23 ; **CRIMINAL LAW**.

CODE. See **REVISED CODE**.**COMMON CARRIER.**

1. *Common carrier; how far may restrict common law liability by special contract.* — A common carrier can make no contract protecting him against liability for his own or his servant's negligence, but may, by special contract with the shipper, reasonably restrict his common law liability in other respects. *S. & N. A. R. R. Co. v. Henlein & Barr*, 606.
2. *Same; burden of proof.* — The carrier cannot escape liability for loss or injury to property transported under special contract, unless he shows not only a loss or injury from a cause within the limitation, but also that it was occasioned without negligence on his part. *Ib.*
3. *Same; responsibility of carrier of live-stock.* — A carrier, undertaking the transportation of live animals, in the absence of a special contract, is chargeable on its common law liability for their safe delivery ; but is not responsible for loss or injuries resulting from their nature or propensities.
4. *Special contract, validity of; how determined.* — Whether a special contract is reasonable and just must be pronounced by the court, in view of all the attending circumstances. *Ib.*
5. *Same; what is reasonable and just.* — A stipulation in a special contract, entered into in consideration of reduced rates and a free pass to the owner, that he shall attend the live-stock and care for it, at his own expense, in case of accidents, is reasonable and valid; and the carrier, if not wanting in the diligence required of him, is not liable for losses occasioned by the shipper's inattention in these respects. *Ib.*
6. *Same.* — A stipulation in a special contract (entered into in consideration of reduced rates and a free pass to the shipper) that the value at the time and place of shipment, *not to exceed fifty dollars per head for ordinary beef cattle*, should be the measure of recovery for any loss for which the carrier is liable, is just and reasonable, and is the measure of the carrier's liability. (*MANNING, J.*, dissenting on this point.) *Ib.*

COMPROMISE. See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 6.**COMPUTATION OF TIME.**

1. *Computation of time from a given day; rule for.* — Where time is to be computed *from* or *after* the day of a given date, that day is to be excluded from the computation, unless it appears that a different computation was intended. *Goode v. Webb*, 452.
2. *Same.* — Accordingly, there being no other evidence than the written lease "for the term of one year *from* the first day of November, 1872, to the first day of November, 1873," it was held that the term commenced on the second day of November. *Ib.*

CONFEDERATE MONEY. See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 5, 7, 8, 9 ; **EXECUTORS AND ADMINISTRATORS**, 3.**CONFEDERATE STATES.** See **CONSTITUTIONAL LAW**, 12, 13.

CONVEYANCE. See DEEDS.

CONTEMPT. See COURTS, 7.

CONSTITUTIONAL LAW.

1. *Art. IV. § 32 of Constitution ; what does not apply to.* — The thirty-second section of Art. IV. of the state Constitution is not restrictive of the power of the general assembly to compound, release, or discharge debts due the State. This power is the same over all debts no matter how originating, and must of necessity reside in some department of the government. Under the Constitution there is no other repository of the power than the general assembly. *State v. Mills & Breüling*, 484.
2. *Act compounding debt due the State ; what not essential to validity of.* — It is not essential to the validity of an act compounding or releasing a debt due the State that it be passed by a vote of two thirds of the members of each house. *Ib.*
3. *Art. IV. § 32 of the Constitution ; to what applies.* — Art. IV. § 32 of the Constitution has no application to dealings between the State and its officials and employees, charged with the collection, keeping, or disbursement of its revenue. It should be so construed so as to prevent the general assembly from effecting in an indirect manner the things conditionally prohibited in that section — as by a loan by a two thirds vote, and a subsequent release of the debt thereby created in favor of the State, by a majority vote. (Per MANNING, J., concurring.) *Ib.*
4. *Art. VI. § 13 of Constitution ; effect of.* — Art. VI, § 13 of the Constitution is not an express grant of civil jurisdiction to justices of the peace, but was intended to limit their jurisdiction to controversies involving a sum not exceeding one hundred dollars, leaving it to the general assembly to determine the class of cases in which it shall be extended to or reduced below that point. *Taylor v. Woods*, 474.
5. *Art. XII. of Constitution ; operation of.* — There is nothing in Art. XII creating the "Bureau of Industrial Resources," or any other part of the Constitution, which prohibits a reduction, by a subsequent statute, of the compensation of the "Commissioner of Industrial Resources," as fixed by prior statutes at the time of his induction into office. *Ex parte Lambert*, 79.
6. *Section 16, Art. I. of Constitution ; not mandatory.* — Section 16 of Art. I. of the Constitution which declares that "suits may be brought against the State in such courts as may be by law provided," is not to be construed as imposing a duty upon the legislature to pass laws authorizing such suits. *Ex parte State*, 231.
7. *Subject-matter of act not clearly expressed in its title.* — The act of the General Assembly of Alabama, entitled "An act to establish the Mobile Charitable Association for the benefit of the common school fund, without distinction of color," approved December 31st, 1868, violates Art. IV. § 2 of the Constitution, and is therefore void. (*Horst, Mayor, &c. v. Moses et al.*, reaffirmed on this point.) *Moses v. Mayor*, 198.
8. *Same.* — Section 17 of the act to "establish the city court of Eufaula" contains no provisions not warranted by the subject of the act as expressed in its title ; such an act necessarily including the jurisdiction to be conferred upon the court, the manner of its exercise, and the parties who may invoke it. *Ex parte Hickey*, 228.
9. *Same.* — The "Act to increase the compensation of executors, administrators, guardians, and county commissioners in Lauderdale county," approved February 19, 1865, is not obnoxious to that part of section 2, Art. IV. of the Constitution of 1865, which declares that "each

CONSTITUTIONAL LAW — *Continued.*

- law shall embrace but one subject, which shall be described in the title." *Key v. Jones*, 238.
10. *Same*. — The subject of the "Act to regulate the confinement and discharge of persons charged with misdemeanor," approved Dec. 17th, 1873, is sufficiently clear and comprehensive, within the meaning of section 1, Art. IV. of the Constitution, to authorize all the provisions of the act. *Giles v. State*, 29.
 11. *Ordinance No. 40 of Convention of 1867, construed*. — Ordinance No. 40 of the Convention of 1867, to allow widows, orphans, and others to review the validity of sales and settlements of estates made by guardians, trustees, &c., passed February 6, 1867, was mandatory upon the general assembly to pass proper laws to carry its provisions into effect; but in the absence of such legislation was inoperative and conferred no power on the courts. *Watson & Wife v. Stone*, 150.
 12. *De jure government of State during late war*. — The state government, as organized and existing, in all its departments in Alabama, during the late war, was its rightful *de jure* government. *Parks, Brewer & Co. v. Coffey*, 32.
 13. *Same; proceedings of courts of*. — Judgments and proceedings of its courts, which during that time formed a portion of that government, not violative of the Constitution and laws of the United States, or infringing upon the state Constitution, are valid and binding. *Ib.*
 14. *Probate judge, office of; statutory*. — The office of probate judge is not created by the Constitution, but exists and its character is defined by statute. The various bonds required of him are not exacted as pledges for integrity and fidelity in the discharge of his judicial functions, but as a guaranty for his responsibility and diligence in the performance of his ministerial duties. *Thompson v. Holt*, 491.
 15. *Same; what amounts to abandonment of office*. — The failure to give the bond required by law as the condition precedent to entering upon the discharge of the duties of the office, is in legal contemplation a failure to accept; and the failure to give the additional bonds, when required, is a refusal to perform the condition on which the right to continue in the office depends, and is an abandonment of it. *Ib.*
 16. *Same; what not removal from office in meaning of the Constitution*. — In either case the failure to give the bonds required is the voluntary act of the judge himself, and the vacancy thereby occasioned, when enforced against him, is in no legal sense a "removal from office" within the meaning of the Constitution, or otherwise violative of its provisions. *Ib.*

See CRIMINAL LAW, 8; GENERAL ASSEMBLY, 3; STATUTES, 5, 6.

CONTRACT.

1. *Contract; when becomes complete*. — Where an order or proposal for the purchase of guano is sent by letter to dealers in Georgia, who, in compliance therewith, ship the guano on board the cars in that State consigned, as directed, to the purchaser here, the contract of sale is complete in the State of Georgia. *Boil v. Maybin*, 252.
2. *Same; validity of in Alabama*. — If valid by the laws of Georgia, such contract will be enforced here; the buyer cannot avoid it because the guano was not branded and inspected before sale under the inspection laws of Alabama. *Ib.*
3. *Non-performance; what necessary to constitute excuse for*. — Where the act of a party, for whose benefit conditions precedent attach, is relied on as an excuse for non-performance, it must be the proximate and not the remote cause of the failure to perform, and be of such a character as to render performance impossible, or induce the belief that it was waived, or if attempted would not be accepted. *Brooklyn Life Ins. Co. v. Bledsoe*, 538.

CONTRACT — *Continued.*

4. *Set-off when allowed.* — Whenever the vendee can maintain a cross-action at law, because of matters arising out of the contract of purchase, or because of the vendor's breach of the contract, and the damages recoverable are fixed by a legal standard, such damages may be insisted on by way of set-off. *Eads v. Murphy*, 520.

See COMMON CARRIER, 2-7; FRAUD, 1, 5; LIFE INSURANCE, 7.

COSTS.

Costs ; when not imposed. — In this case, although the judgment of the circuit court was reversed and a peremptory writ of prohibition issued, no costs were imposed on the county judge. *State v. McDuffie*, 4.

COUNTIES.

1. *County taxes ; not payable in warrants.* — In the absence of a special enactment authorizing it, the tax-collector has no authority to receive warrants on the county treasury in payment of taxes due the county, and there is no provision in the Revenue Law of 1868 which gives such authority. *Burke v. Armstrong*, 48.
2. *Sheriff's fees under § 4438 Rev. Code ; how paid in Marengo county.* — The "Act to consolidate the fund of fines and forfeitures and the general fund of the county of Marengo," approved February 13, 1871, has the effect to make claims which might accrue under § 4438 of the Revised Code a charge against the county to be paid out of its general fund. *Michael v. Marengo County*, 159.
3. *Same ; when such claims are barred for failure to present to commissioners' court.* — Under that act, claims not presented within twelve months are barred by Rev. Code, § 909. But claims existing at the passage of said act were not barred if so presented in twelve months thereafter, and the time for such presentation was further extended by the act approved March 4, 1873, to the 1st day of January, 1874. *Ib.*

COURTS.

1. *Judicial proceedings during late war.* — Judicial proceedings, had in the courts of this State during the late war, are valid and binding in all respects, save where they conflict with the Constitution and laws of the United States, or tend to impair the just rights of citizens thereunder. *Hill v. Huckabee*, 155. See also *Parks, Brewer & Co. v. Coffey*, 32.
2. *Presumption as to existence of jurisdictional fact.* — No presumption of the existence of the jurisdictional fact arises from the mere exercise of jurisdiction by a court of inferior or limited jurisdiction ; yet when its record declares the ascertainment of such jurisdictional fact, its determination is conclusive until reversed on appeal. *Pettus v. McClannahan*, 55.
3. *Judgments ; control of court over, after adjournment of term.* — The supreme court has no power, at a subsequent term, to entertain a motion to dismiss an appeal upon the same grounds of a motion which had been overruled at a former term. *Dunlap v. Newman*, 178.
4. *Judgment ; what may be set aside at subsequent term.* — Void judgments may be set aside after the expiration of the term ; but to authorize this, the invalidity of the judgment must appear on the face of the record, and not from matter *dehors* the record, except in cases of fraud, and where judgment was rendered after the death of a party. *Pettus v. McClannahan*, 55.
5. *City court of Mobile ; power to hold special terms.* — The city court of Mobile has authority to hold, by special adjournment, such terms as may be necessary for the dispatch of business, and at such special term may exercise its full criminal jurisdiction, including the origina-

COURTS — *Continued.*

- tion, of a grand jury, if, in its judgment, the public good requires it. *Wilson v. State*, 299.
6. *Russell circuit court ; authority of at special term.* — The circuit court of Russell had authority to compel the trial of a criminal case at the special term, held under the act of December 11th, 1874, although the case had been regularly reached and continued at the preceding regular term. *Fields v. State*, 348.
 7. *County court ; of what proceeding has not jurisdiction.* — The county court has no jurisdiction, either under the statutes or its power to punish for contempts, of a proceeding to impose upon the sheriff the fine of \$100, authorized by § 4167 R. C., for his failure, from want of due diligence, to execute a "writ of arrest;" and if it takes cognizance of such a proceeding the sheriff is entitled to prohibition to restrain its action in the matter. *State v. McDuffie*, 4.
 8. *Justice of the peace ; jurisdiction of in actions of tort.* — The jurisdiction of justices of the peace in actions of tort never having been extended beyond fifty dollars by act of the general assembly, that officer has no jurisdiction of an action for the recovery of chattels *in specie*, where the value claimed exceeds fifty dollars. *Taylor v. Woods*, 474.
 9. *Circuit judge ; authority to approve sheriff's bond.* — Under the law of force on the 27th day of December, 1871, a circuit judge had no authority to approve the bond of a sheriff elected that year. *Cook v. Candee*, 109.

CRIMINAL LAW.

ADULTERY.

1. *Evidence anterior and subsequent to offence ; when admissible.* — On a charge involving illicit intercourse, during a particular period, evidence of acts anterior or subsequent to that time, which tend to illustrate or explain similar acts within the particular period, although not evidence on which to base a conviction, are admissible in connection with evidence of similar acts during the time laid, to prove illicit intercourse as charged. *Alsabrooks et al. v. The State*, 24.

ARSON.

2. *Arson ; degree of ; test for distinguishing indictment.* — Under a statute dividing arson into three degrees, and clearly defining the circumstances which constitute arson in the first and second degrees, and providing that "arson committed under such circumstances as do not constitute arson in the first or second degree is arson in the third degree," an indictment merely charging arson in the general words of the statute, and following the analogous forms given for the higher degrees, without alleging any fact or circumstance which constitutes arson in the first or second degree, is necessarily an indictment for arson in the first degree, and is sufficient in form and substance. *Brown et al. v. The State*, 345.
3. *Arson in the third degree ; value of property burned immaterial.* — The value of the building and contents burned is not an element of the offence in arson in the third degree. *Ib.*
4. *Arson in first degree ; what sufficient finding to authorize sentence for.* — The first of the three degrees of arson is the only one on conviction of which the jury is authorized to affix imprisonment in the penitentiary; and a general verdict of guilty, returned on an indictment charging arson in the first degree in a single count, and affixing imprisonment in the penitentiary, is therefore sufficient to authorize sentence for that offence, although the verdict does not expressly state the degree of which defendant is convicted. *Davis v. The State*, 357.

CRIMINAL LAW — *Continued.* ARSON — *Continued.*

5. *Same ; property, in whom laid.* — Although the building burned is situated on the premises of another, the ownership is properly laid in the name of a servant who dwelt in the house, the owner having given her possession for that purpose under a contract of hiring which bound him to do so as long as she remained in his service. *Davis v. The State.*

ASSAULTS.

6. *Assault with intent to murder or maim ; what charge as to, erroneous.* — On the trial of an indictment for an assault with intent to murder or maim, a charge that "there must have been a deliberate specific intention to murder or maim the person assaulted" is calculated to mislead the jury, and is erroneous. *Allen v. The State*, 391.
7. *Provocation ; what not sufficient to deprive assault of felonious character.* — Sudden passion upon adequate provocation may deprive an assault of its felonious character ; but mere passion not suddenly aroused by sudden affray in which the accused was not the aggressor, will not deprive an assault, with a deadly weapon, of its felonious character. *Ib.*

BASTARDY.

8. *Imprisonment for debt ; what is not within meaning of the Constitution.* — The sections of the Revised Code which require the imprisonment of the putative father in bastardy proceedings, if he fail to give bond for the support of the child, are not violative of the constitutional inhibition against imprisonment for debt. *Paulk v. The State*, 427.
9. *Paternity of child ; what evidence relevant on issue as to.* — The issue being as to the paternity of the bastard child, the defendant may prove that the child bears no likeness to him, or that it resembles another man who had opportunities of illicit intercourse with the mother ; but proof that the child resembled the children of another man, without showing in what particular, or that such children resembled their father rather than their mother, is too vague and indefinite and is properly excluded. *Ib.*

BAWDY-HOUSE KEEPER.

10. *Common law offence of keeping bawdy-house ; not repealed.* — Section 3630 of the Revised Code upon vagrancy, which makes amenable to its provisions "any person who is a common prostitute, or the keeper of a house of prostitution, and has no honest means of employment," &c., does not repeal the common law offence of keeping a bawdy-house ; and the punishment for the latter offence not being "particularly specified" in the Revised Code, the court, on conviction, may properly award the punishment authorized by section 3754 of the Revised Code. *Ex parte Birchfield*, 377.

BIGAMY.

11. *Bigamy ; what charge as to erroneous.* — Held, that upon the facts of this case, as detailed in the opinion, a charge that "marriage in cases of this kind could be proved by cohabitation, living together, or the confession of the parties ; that it was like any other civil contract in this respect ; and it was not necessary to show by proof, that the requirement of the statutes were conformed to in order to establish a marriage in either case, and that it was not necessary to show the authority of the parties who solemnized the marriages," &c., was erroneous. *Brown v. The State*, 338.

BURGLARY.

12. *Burglary ; what constitutes.* — Going down a chimney into a house, used for storing cotton, with the intent to steal, and getting out through a

CRIMINAL LAW — *Continued.* BURGLARY — *Continued.*

window by breaking the inside fastening, is a sufficient "breaking into and entering" to constitute burglary as defined by section 3695 of the Revised Code. *Walker v. The State*, 379.

13. *Ownership of house burglariously entered; in whom laid.* — Where the prosecutor by consent of the owner of the freehold erects on it a building, for their mutual convenience, which is in their joint use at the time of the burglary, the ownership is properly laid in them jointly. *Webb v. The State*, 422.

CARRYING CONCEALED WEAPONS.

14. *Concealed weapon; burden of proof as to exculpatory facts.* — The carrying of a weapon concealed not being denied, it is not error to instruct the jury, who have been previously charged as to the law of the case, "if they are not satisfied from all the evidence that the defendant had good reason to apprehend an attack" (that being the only defence) "they must find him guilty." *Hogg v. State*, 2.
15. *Same; what not sufficient to excuse.* — Reasonable ground to apprehend an attack at a dangerous locality which defendant visited about day-break, will not be a sufficient excuse for casually carrying concealed a weapon, procured for that visit, late in the day at a locality not shown to be dangerous. *Chatteaux v. The State*, 388.

CHARGE TO JURY.

16. *Charge to jury; what, error to refuse.* — It is error to refuse to charge the jury, on the trial of an indictable offence, that they must be satisfied "beyond all reasonable doubt and to a moral certainty" of the existence of every fact necessary to establish the defendant's guilt. *Williams v. The State*, 411.
17. *Same.* — After charging the jury on defendant's written request, as to the ascertainment of the sense and meaning in which he used a particular word, it is not error to further instruct the jury that they must look to the evidence in order to determine that question. *Blair v. The State*, 343.
18. *Charge to jury; what erroneous.* — A charge to the jury to convict, if they believe the evidence, is erroneous, if any material fact is to be inferred and is not a conclusive presumption from such evidence. *Weil v. The State*, 19.
19. *Same.* — A charge which assumes as proved a fact which is disputed, cannot be given without a palpable invasion of the province of the jury and is always rightly refused. *Boddie v. The State*, 325.
20. *Same.* — A charge that the jury must acquit, "if from all the evidence there is a probability of the innocence of the defendants," is, without more, calculated to mislead the jury and is properly refused. *Williams v. The State*, 411.
21. *Same.* — It is error to charge the jury in a criminal case that, "although they may have a reasonable doubt of any single fact in the testimony of any witness, they cannot acquit unless such fact is material to the issue joined." *Williams v. The State*, 26.
22. *Same.* — The court never errs in refusing a charge requiring explanation, or which has a tendency to mislead or confuse the jury, *e. g.*, as where the court in its charge enumerates several facts connected with a criminal transaction, upon consideration of which the jury might pronounce a verdict of guilt, and the defendant singles out one of these facts, and requests a charge that "from this fact alone" guilt cannot be inferred. *Adams v. The State*, 379.
23. *Same.* — A charge, based upon all the evidence which withdraws from the consideration of the jury a material element of the offence, should be refused. *Jordan v. State*, 188.
24. *Same.* — On the trial of an indictment under § 3643 of the Revised

CRIMINAL LAW — Continued. CHARGE TO JURY — Continued.

Code, it is error for the court, in its charge to the jury, to refer to the action of the general assembly in refusing to pass a bill, allowing a railroad corporation to issue change bills. *Jordan v. State*, 188.

25. *Reasonable doubt ; what charge as to erroneous.* — The doubt which requires an acquittal must be an actual, substantial doubt, generated from a careful weighing of the evidence, and not a mere possibility or speculation. Charges which are so general as to authorize an acquittal upon mere possibility or speculative doubt are properly refused. *Owens v. The State*, 400.
26. *Section 2756 of Revised Code, construed.* — Section 2756 of the Revised Code secures to parties the unqualified right to have charges, moved for in writing, given in the very terms in which they are written, if embodying correct legal propositions and not abstract or misleading. *Eiland v. The State*, 322.
27. *Same.* — If the charge requested needs qualification, modification, or restriction, to render it a correct legal proposition, applicable to the evidence, it should be refused. If the court gives a charge, which it might have refused without error, it cannot afterwards add a qualification, however correct in point of law. Any other ruling nullifies the plain terms of the statute. *Ib.*
28. *Same ; right to explain charge defined.* — The statute does not prohibit the explanation of a charge, in order to relieve it from involvement or obscurity, or to make plain and interpret the terms employed, if necessary to prevent its misleading the jury, or to enable them intelligently to apply to the case before them the principles of law asserted in the charge. *Ib.*
29. *Same.* — Section 2756 of the Revised Code, which requires written charges to be given or refused in the terms in which they are asked, does not forbid the court after giving a written charge, at the defendant's request, as to a particular phase of the testimony, from instructing the jury in another charge, that they must look to all the evidence and not a part of it, in forming their verdict. *Hogg v. The State*, 2.
30. *Charge to jury ; what not erroneous as to law of self-defence.* — The court in charging upon the law of self-defence may properly instruct the jury that to justify the taking of life there must be an "imperious necessity" existing, or reasonably apparent, to prevent the commission of a felony or great bodily harm. *Eiland v. The State*, 322.
31. *Misleading charge ; when ground for reversal.* — If a charge given has a tendency to mislead, the party objecting to it should ask an explanatory charge ; failing to do this, his exception will not be available on error unless the inevitable effect of the charge was to mislead the jury. *Ib.*
32. *Province of jury.* — It is for the jury to say, in view of the character of the deceased, what his threats and conduct at the time of the homicide really imported, and how far they illustrate the condition of the parties and the motives which actuated them. A charge singling out a particular act or isolated expression of the deceased, and instructing the jury that *that* act or threat cannot be invoked to illustrate this bad character, is an invasion of their province and necessarily erroneous. *Ib.*
33. *What charge properly refused.* — A charge which would authorize the jury to acquit, if the homicide was committed under the apprehension of danger, whether to life or limb, or of lesser injury, without regard to the reasonableness of the apprehension, is properly refused. *Ib.*
34. *Countersigning paper, &c. ; erroneous charge as to proof of.* — On a prosecution under § 3643 of the Rev. Code, "for countersigning a

CRIMINAL LAW — *Continued.* CHARGE TO JURY — *Continued.*

paper," &c., "issued without authority of law for purposes of money, or for general circulation," a charge that the defendant could not be convicted, "unless there was proof by an eye-witness to the signature, or proof that defendant admitted the signature to be his, or that the signature was in his handwriting," is erroneous. *Jordan v. State*, 188.

EVIDENCE.

35. *Evidence; sufficiency of.* — Evidence which is pertinent, and tends to prove the issue, cannot be excluded merely because it is "weak and inconclusive." Its sufficiency is a question for the jury. *Alsabrooks v. The State*, 24.
36. *Opinion of witness; what, inadmissible.* — A witness who was very wakeful and saw defendant go to bed, in the same room in which witness slept that night, and found him there next morning, cannot give his opinion "that the defendant could not have left the room without his knowing it," as proof to establish an *alibi* for the defendant. *Bennett v. State*, 370.
37. *Dying declarations; admissibility of.* — Dying declarations are inadmissible, unless made under a sense of impending dissolution, and concerning the circumstances immediately attending the acts occasioning the declarant's death and forming a part of the *res gestæ*. *Walker v. State*, 192.
38. *Same; case in point.* — Deceased was badly shot, and in reply to efforts by his physicians to encourage and buoy him up said he "was mortally wounded, and knew he would die, and requested a minister to be sent for," which was done. On being questioned as to the circumstances of the difficulty, he replied, "I am suffering a good deal now. I will tell you more about it after a while." After this, but how long is not shown, the deceased made declarations which the court admitted against defendant's objection. *Held*, that the State should have shown how long it was after the encouragement was given before the declarations were made, and what the deceased's opinion then was as to his condition. *Ib.*
39. *Res gestæ; admissibility of declarations of deceased identifying prisoner, as part of res gestæ.* — The defendant, Jake Wesley, being on trial for murder, it is competent to prove, as part of the *res gestæ*, that deceased, having been aroused before day by a noise at his chicken house, and going out to see what occasioned it was shortly afterwards heard to exclaim, "Jake, what are you doing here?" when it appears that, on returning in a short time and dressing himself, deceased again went out and was absent five or six minutes, during which time witness heard the reports of two shots, and saw deceased return wounded. *Wesley v. State*, 182.
40. *Declarations of the deceased; when not part of the res gestæ.* — Declarations or statements made by the deceased, in the absence of the prisoner, while walking to a church, at which he was killed that night, about fifteen minutes after his arrival, as to why he had not killed the prisoner in a difficulty which had occurred between them on the afternoon of the same day, are not admissible evidence against the prisoner on trial for the murder of the deceased. *Jackson v. The State*, 305.
41. *Dying declarations; verbal evidence of; when not inadmissible.* — A person who has heard dying declarations may be examined verbally as to them, although a magistrate present took down and reduced to writing declarations made to him, at the same time, which were read over to and approved by the deceased, and were then in the custody of the court. *Kelly v. The State*, 361.

CRIMINAL LAW — *Continued.* EVIDENCE — *Continued.*

42. *Excitement of prisoner; what evidence of, inadmissible.* — It is error to allow a witness to state that the prisoner "looked excited;" the signs of excitement should be stated, and the question left for the determination of the jury unbiased by the witness's opinion. Such evidence should always be received and weighed with great caution. *Gassenheimer et al. v. The State*, 314.
43. *Threats by deceased; when admissible in favor of defendant.* — Threats made by the deceased, a short time before the commission of the homicide, indicating an angry and revengeful spirit towards the prisoner and a determination to do violence to his person, which were communicated to the prisoner a short time before the killing, are admissible evidence in his favor. *Powell v. The State*, 1.
44. *Conspirators; acts of one when evidence against all.* — Where several persons combine to commit an offence, what is said and done by one in the presence of the others, while in the commission of the offence, is admissible evidence against all of them, both as parts of the *res gestæ* and as acts of a confederate cooperating with the other conspirators in an unlawful act. *Smith et al. v. The State*, 407.
45. *Distinct substantive offence, evidence of, on trial of another; when admissible.* — Evidence of one distinct substantive offence is generally inadmissible on the trial of another, but may be resorted to in some cases: *e. g.*, as where the offence charged and that proposed to be proved constitute but one transaction, or to prove the identity of the offender; where it is necessary to prove a motive, and there is an apparent connection between the criminal act proposed to be proved and that charged; where the accusation involves a series of criminal acts which must be proved to make out the offence; where it is necessary to prove a *scienter*, and the like. *Gassenheimer et al. v. The State*, 314.
46. *Same; what not admissible in proof of scienter.* — In a prosecution for receiving a sack of cotton knowing it to have been stolen, it is not competent for the State to show, in proof of the guilty knowledge of defendants, that "the week previous to the finding of the sack of cotton in defendants' storehouse, persons had been seen going in just before and about daybreak, with sacks of cotton, and coming out with the sacks empty." Such facts alone neither show that such sacks of cotton were stolen, nor that defendants knew it when they received them. *Ib.*
47. *Bad character of deceased; when admissible evidence.* — Evidence of the bad character of the deceased for violence, &c., is admissible when it illustrates or tends to illustrate the circumstances attending the homicide, and to qualify, explain, and give meaning and point to the threats and conduct of the deceased at the time of the killing. *Eiland v. The State*, 325.
48. *Same.* — Such proof is not limited to cases in which the degree of homicide, or the fact that the killing was in self-defence, is doubtful; but it should never be received when there is no act or word of deceased, at the time of the killing, which can be explained or illustrated by such character, or when there is no evidence tending to show that the killing was in self-defence. *Ib.*
49. *Confessions of guilt; what admissible.* — Where the owner of stolen property not suspecting the defendant, offered him a reward if he would get the property and thief, and the defendant a few days thereafter brought back the property and demanded the reward, and on being refused because he had not brought the thief, replied that he was the thief, and again demanded the reward, such declarations are properly admitted against him, on a trial for the larceny of the property, as confessions of guilt. *McIntosh v. The State*, 355.
50. *Same; weight to be accorded to.* — There is no rule of law requiring

CRIMINAL LAW — Continued. EVIDENCE — Continued.

- the jury to give equal credence to every part of a confession "unless it is clearly disproved." All of it must be carefully weighed in the light of the surrounding circumstances, the motives which may have induced it, and its consistency with the other evidence, and the jury, without capriciously accepting or rejecting any portion, should credit such parts as they find reason for believing, and reject that part which they find reason for disbelieving. *Eiland v. The State*, 323.
51. *Same.* — Statements made by the prisoner, at his own house, in response to a question "how he came to shoot the deceased," and not induced by any threats, duress, or promises, are admissible evidence against him. *Walker v. State*, 192.
 52. *Same.* — Where a conviction of the husband is sought on a sale of liquor, without license, made by the wife in his presence and with his knowledge, evidence of similar sales made by her in his presence (although not proof to convict him) is admissible "to illustrate the character of the sale" in the particular case, and to show that it was made by authority of the husband. *Hensley v. The State*, 10.
 53. *Sale; what sufficient to prove.* — In the absence of other evidence, testimony of a witness that he "bought" the liquor, is sufficient to prove a "sale" of it. *Ib.*
 54. *Evidence as to loss of property; what properly received.* — A witness who testified that he had lost cotton from his gin-house is properly permitted to state that he ascertained that fact by a comparison of the weight of the cotton when first put into the house with its weight after being "ginned out." *Gassenheimer et al. v. The State*, 313.
 55. *Same; what competent evidence.* — On the trial of an indictment for the wilful failure to appear, after entering into the recognizance, the bond or undertaking entered into is relevant evidence. *Avery v. The State*, 341.
 56. *Evidence; what irrelevant on trial of larceny.* — On a trial for larceny, proof of the "bad character" of the employees and others about the warehouse, from which the property was stolen, who are in nowise connected with the case either as defendants or witnesses, and not charged with the theft, is wholly foreign to the issue and utterly inadmissible. *Bennett et al. v. The State*, 370.
 57. *Same; relevancy of evidence on indictment for.* — Under an indictment for arson in the third degree where the building is designated a "corn crib," proof that "corn and fodder were kept in it" is relevant and proper to show that the building was such an one as described in the indictment; but proof of what was in it at the time it was burned is irrelevant, and should be excluded on motion. An objection to the whole of such testimony, not distinguishing between the legal and illegal, is properly overruled. *Brown et al. v. State*, 349.
 58. *Vote; what best evidence of.* — The poll-lists are the highest and best evidence of who voted at an election; and when it does not appear from them that the defendant voted in his real name, or in the name by which he is indicted, or that there is a name on the poll-list representing the ballot cast by him, there can be no conviction for illegal voting. *Wilson v. The State*, 299.
 59. *Conviction on circumstantial evidence, rule as to.* — The case of *Faulk et al. v. The State* (in MS.) explained, and the doctrine, laid down in *Mickle v. The State* (27 Ala. 22) again declared, — that the true test for determining the propriety of a conviction on circumstantial evidence is not whether the circumstances proved produce as full conviction of guilt as the positive testimony of a single credible witness, but whether they produce moral conviction to the exclusion of every reasonable doubt. *Faulk v. The State*, 416.
 60. *Declarations of prosecutor and response of defendants thereto; when not*

CRIMINAL LAW —Continued. EVIDENCE — Continued.

competent evidence. — Proof that the prosecutor, after he had been drawn and summoned as a grand juror, proposed to the defendants not to prosecute them if they would pay for the stolen property, which offer was refused, is properly rejected as evidence for the defence, unless shown to be parts of the *res gestæ*. *Williams v. The State*, 411.

61. *Good character, proof of; how to be weighed.* — Proof of good character is admissible in all criminal prosecutions, not only where doubt exists on the other proof, but also to generate a doubt. Such proof, however, is not to be considered "independent of," but in connection with the testimony; and it is for the jury to say, after a deliberate consideration of all the evidence, whether it establishes the guilt or innocence of the prisoner. *Ib.*

FALSE PRETENCE.

62. *False pretence; allegation as to, construed.* — An allegation in the indictment that defendant falsely pretended that "he had one small black mule," is rightly construed as an averment that he "had" the mule as owner. *Franklin v. The State*, 414.
63. *Same; what charge erroneous.* — On the trial under the indictment a charge directing an acquittal "if defendant had the mule, whether he owned it or not," is properly refused, where the proof shows that although defendant was in possession of the mule he did not own it. *Ib.*
64. *Same; what variance immaterial.* — Where the false pretence charged was to H. B. Clark, and that proved was to Hiram B. Clark, the variance is immaterial, if the proof shows that H. B. Clark and Hiram B. Clark were the same person. *Ib.*

GAMING.

65. *Gaming-table; keeping or exhibiting, constituents of offence.* — The only proof of "keeping or exhibiting a table for gaming," consisted of the testimony that defendant urged witness to go with him to defendant's room; that witness, defendant, and two others, went to defendant's room, which contained a bed on which he slept and "a plain pine table, without letters, device, or figures thereon," from which defendant took up a deck of cards, separating the pack into two parts, in one disclosing an "ace" and the other a "king," and offered to bet witness a sum of money that defendant could shuffle the two portions so as to bring out the "ace" and "king" together; that witness declined, when one of the persons who accompanied them to the room offered to "go halves" with witness, if he would bet, which witness declined; that witness shortly left the room; that nothing was done with the cards, other than as stated; that no game was played and no offer made to play any game or to make any other bet. *Held*: 1. That the evidence did not authorize the conviction of defendant under § 3621 of the Revised Code, for "keeping or exhibiting a table for gaming." 2. That under such a state of facts, it is error for the court to charge, *ex mero motu*, that any table which was kept for the purpose of playing cards or other games thereon, whether the table formed a part of the game or not, was a gaming-table within the meaning of the statute; and that to constitute a gaming-table it is not necessary that any game should ever have been played on the table, if it was "kept and exhibited for that purpose." *Owens v. The State*, 213.
66. "*Public place;*" *what is within meaning of section 3610 of the Revised Code.* — Any house to which all who wish can go night or day and indulge in gaming, is a "public place," within the meaning of the

CRIMINAL LAW — *Continued.* GAMING — *Continued.*

statute. The fact that it is used as a bedroom, kept locked so that no one can enter but by permission, and after surveillance from the inside, and otherwise invested with privacy, will not prevent the characteristic of a "public place" attaching to it, if it is frequented by all who wish to engage in the sports which the occupant there carries on, and for the indulgence of which he furnishes the appliances. *Smith v. The State*, 384.

HABEAS CORPUS.

67. *Habeas corpus*; petition for, what sufficient. — A petition for *habeas corpus* containing the statements prescribed by section 4262 of the Revised Code, and verified as required by section 4261, is not demurrable because it fails to allege that the petitioner is illegally restrained of his liberty. *Ex parte Champion*, 311.
68. *Same*; duty and authority of probate judge. — A prisoner, not under indictment, committed by a justice of the peace after preliminary investigation, may apply to the probate judge for a writ of *habeas corpus*, and it is the duty of the judge to hear and pass upon the evidence touching the prisoner's guilt, and to discharge him if it appears that no offence has been committed, or there is not probable cause for charging the prisoner with it. *Ib.*
69. *Same*; practice indicated. — If the prisoner has been committed after investigation before a duly authorized officer, he should not be discharged unless the witnesses previously examined against him, if still living and attainable, are produced and examined. If any material witness, who testified on the examination, is absent on the hearing, the prisoner should not be discharged, but the amount of bail fixed, if the case be bailable, and the prisoner detained until it is given. *Ib.*
70. *Same*; when not proper remedy. — The court inclines to the opinion that *habeas corpus* is not the remedy to obtain a discharge from imprisonment on ground of the unauthorized discharge of the jury charged with the trial. *Ex parte Winston*, 419.

HOMICIDE.

71. *Murder in second degree*; charge as to, what erroneous. — A charge that "murder in the second degree includes those cases of constructive murder which are not accompanied with the intent to take life, but are committed by gross carelessness, or in the commission or attempt to commit some other crime than arson, rape, robbery, or burglary, and that the jury cannot convict of murder in the second degree if they believe the killing was malicious, or was not committed in the commission or attempt to commit some other crime than above specified," is calculated to mislead the jury, and is properly refused. *Fields v. The State*, 348.
72. *Murder in second degree*; what definition of not erroneous. — A definition of murder in the second degree as "the unlawful killing of a reasonable person with malice aforethought, either express or implied," is not erroneous. *Ib.*
73. *Conviction for lower degree of murder*; acquittal of higher. — Where defendant has been convicted of murder in second degree, and obtains a reversal, he cannot afterwards be put on trial for the higher degree. *Ib.*
74. *Homicide, justification for*; what cannot be set up. — The slayer cannot urge in justification of the killing a necessity produced by his own wrongful or unlawful act. *Eiland v. The State*, 322.
75. *Duty of retreat*. — Our common law of homicide is derived from that of England, and wherever that law requires the person assaulted to decline the combat, or retreat before he will be excused in taking

CRIMINAL LAW — *Continued.* HOMICIDE — *Continued.*

the life of his adversary, our law requires the same. *Eiland v. The State*, 322.

76. *Peril of mere battery ; will not justify taking of life.* — Peril of a mere indignity to the person or of a battery, from which great bodily harm cannot reasonably be apprehended, will not justify the taking of life, although such peril could not be escaped by retreat, or the danger to it would thereby be increased. *Ib.*
77. *Malice ; presumption of from weapon used.* — A deliberate killing with a deadly weapon is presumed to be malicious ; but if the facts and circumstances are in evidence, the presumption must be drawn from the whole evidence and not from the nature of the weapon only. This presumption it is for the jury to draw, and no one fact should be singled out and disconnected from the other evidence, and malice or any other necessary fact inferred from it. *Ib.*

See CRIMINAL LAW, 29, 31, 42, 46, 47.

HUSBAND AND WIFE

78. *Husband ; when may be punished for acts of wife.* — The husband may be punished criminally for an indictable offence, not *malum in se*, committed by the wife in his presence and with his knowledge. *Hensly v. State*, 10.

See CRIMINAL LAW, 52.

ILLEGAL VOTING.

79. *Minor ; when cannot be convicted of illegal voting.* — A minor, who is otherwise duly qualified, cannot be convicted of illegal voting because he was not of the requisite age, if he voted under the honest belief, induced by information from parents, relatives, or acquaintances having knowledge of the time of his birth, that he had obtained his majority. *Gordon v. The State*, 308.
80. *Same ; mistake of fact as to age, &c., when no excuse.* — If one votes recklessly or carelessly, when the facts are doubtful or uncertain, his ignorance will not excuse him, if in fact he was not qualified ; and whether the defendant acted honestly on diligent inquiry, or recklessly without proper care to learn the facts, is a matter which should be left to the determination of the jury. *Ib.*
81. *Perjury ; what essential to conviction for, under election law.* — However recklessly the defendant may have taken the oath required of persons challenged, under the election law, there can be no conviction for perjury if the oath is true in point of fact. *Moore v. The State*, 424.
82. *Same ; what not defence, but may be mitigation for.* — Not voting, after taking the false oath, is no ground for acquittal, but may be urged in mitigation of punishment. *Ib.*

See CRIMINAL LAW, 58, 86, 87.

INDICTMENT.

83. *Arson ; test for distinguishing degree of.* See *Brown et al. v. The State*, 345.
84. *Burglary.* — An indictment under section 3696 of the Revised Code, for burglary in a house in which cotton was kept for use, is defective unless it alleges the value of the cotton. Strict correspondence between the allegations and proof on this point is not essential ; if the thing on deposit is of any real pecuniary value, proof of such value will support the averment. *Webb v. The State*, 422. See, also, *Robinson v. State*, 587.
85. *Destroying public bridge.* — An indictment under section 3737 of the Revised Code, charging the wilful destruction or injury otherwise,

CRIMINAL LAW — Continued. INDICTMENT — Continued.

- than by burning, of a designated public bridge erected by authority of law, on a specified road, is not demurrable because ownership and value are not alleged. *Owens v. The State*, 400.
86. *Illegal voting*. — A count of an indictment, framed under § 40 of the act to regulate elections, &c., approved April 22, 1873, charging that the defendant, not being twenty-one years of age, voted at a given general election held in this State, is sufficient; but a mere general accusation of illegal voting, without specifying in what the illegal voting consisted, is not sufficient to support a conviction. *Gordon v. The State*, 308.
87. *Same*. — An indictment, under the "Act to regulate elections in the State of Alabama," approved April 22, 1873, charging the defendant with having "voted more than one time" at a general election, held on a given day, in a particular county, is not demurrable because it fails to allege the names of the persons or officers for whom the defendant voted, nor subject to demurrer on other grounds. *Wilson v. The State*, 299.
88. *Larceny*. — An indictment which describes the owner of the stolen property by her surname only, without any averment that her christian name was unknown to the grand jury, is bad on demurrer. *Morningstar v. The State*, 405.
89. *Plea of not guilty; waiver of what defects*. — A plea of not guilty is an admission of the genuineness of the indictment and a waiver of irregularities in filing or presenting it. *Ex parte Winston*, 419.
90. *Forfeited recognizance*. — An indictment under the act for wilfully failing to appear and answer, after being released "without security," need not allege that the defendant was informed by the officer discharging him of the penalty for a failure to appear, nor that the recognizance was formally forfeited. *Giles v. The State*, 29.
91. *Robbery*. — In indictments for robbery under the Code, if the felonious intent is averred, the taking of the property from the party robbed may be charged to have been "against his will, by violence to his person," or "by putting him in such fear as unwillingly to part with the same," in different counts or in the same count in the alternative. In either case the omission to charge the felonious intent is fatal. *Chappell v. The State*, 359.
92. *Presentation of, and filing in court, how shown*. — An indictment indorsed "a true bill," and signed by the foreman, and also indorsed and signed by the clerk "filed in open court by the foreman of the grand jury, in the presence of fourteen other members of the grand jury," on a named day of the term at which the indictment was found, cannot be abated on plea that it was not presented to, and filed in court, in the manner prescribed by law. Such an indictment shows a literal compliance with the statute. *Wesley v. The State*, 182.
93. *When date of filing of, may be looked to*. — Where the defence set up is that the transaction, constituting the offence as charged, was another and different transaction from that proved, which it was contended had occurred subsequent to the finding of the indictment, it is not erroneous to instruct the jury that while the indictment is not evidence, the date of the filing indorsed on it may be looked to as evidence. *Sellers v. The State*, 368.
94. *Name of third person; what certainty requisite*. — Wherever an essential averment of the indictment is the name, or rather the identity, of a third person, the indictment must be as certain to such person as to the person charged. Under section 4113 of the Revised Code, where the defendant's name "is to the grand jury unknown," it may be so averred without further description, and the policy of this enactment should be extended generally to offences against the person and property of a third person. *Morningstar v. The State*, 405.

CRIMINAL LAW — Continued. INDICTMENT — Continued.

95. *Inmaterial averment; what need not be proved.* — An allegation in the indictment that the defendant is "a freedman," is mere surplusage, and should be disregarded. That fact, under our laws, is neither descriptive of the fact or degree of the crime nor material to the exercise of jurisdiction. *McGehee v. The State*, 224.
96. *Indictment under Revenue Law of 1868; sufficiency of.* — An indictment for a violation of § 111 of the Revenue Law of 1868, pursuing the Code form for the kindred offence of retailing without license, and setting forth, in addition, that the business was carried on in a place "not an incorporated city, town, or village," is not bad on demurrer for uncertainty or insufficiency, nor because it charges that the defendant "*was engaged*" in the business of a retailer, instead of charging that he "*did engage*" in such business. *Childs v. The State*, 14.

JUDGMENT — VERDICT — SENTENCE.

97. *Sentence; what sufficiently definite.* — A sentence to hard labor for the county for a given period, and also for a "sufficient length of time to pay all the costs and officer's fees in the case, not exceeding forty cents per day," in the absence of any objection in the court below, is sufficiently certain, and will not be disturbed by the appellate court. *McIntosh v. The State*, 355.
98. *Penalty on conviction for engaging in business without license.* — The penalty on conviction for engaging in business without license, under the Revenue Law of 1868, is three times the annual license, and not three times the amount of license from the date of the act done to the end of the year. *Weil v. The State*, 19.
99. *Verdict; what sufficient to authorize sentence.* — A verdict which merely ascertains the defendant's guilt, without more, is properly construed to mean guilty as charged in the indictment, and authorizes sentence accordingly. *Giles v. The State*, 29.
100. *Same, form of; duty of prosecuting officer as to.* — The prosecuting officer and the court should look after the form and substance of the verdict returned by the jury. If it be insufficient in either particular, the court should decline to receive it, and give the jury instructions which will enable them to correct it. *Allen v. The State*, 391.
101. *Same; what is a nullity.* — A verdict finding the defendant "*guilty of an intent to maim*," on the trial of an indictment charging an assault with intent to murder or maim, is a mere nullity, and a motion in arrest of judgment should be sustained to it. If this is overruled and sentence passed, this court will reverse on appeal, and award a *venire facias de novo*. *Ib.*
102. *Motion in arrest of judgment; on what predicated.* — Motion in arrest of judgment can only be predicated upon matter which appears of record without the aid of a bill of exceptions. *Brown et al. v. The State*, 345.
103. *General verdict, referred to good count.* — A general verdict of guilty, responding to the whole indictment, will support a judgment of conviction if any one count is sufficient. *Chappell v. The State*, 359.
104. *Record; conclusiveness of recitals of.* — The recital in the record that "defendant, in open court, acknowledges service of a copy of the indictment and list of jurors, one entire day before the day set for trial," &c., concludes him from disputing such service, and dispenses with all further inquiry, or other recital as to it, even if such service was required to appear affirmatively of record, to uphold the conviction. *Wesley v. The State*, 182.

CRIMINAL LAW — *Continued.*

JEOPARDY.

105. *Jeopardy; when does not arise.* — No legal jeopardy arises on a trial under an indictment, which is so defective that no valid judgment of conviction can be rendered on it. *Robinson v. The State*, 587.

JURY.

106. *Oath of jury; what recital sufficient.* — A recital in the judgment-entry that the jury was "duly sworn according to law to try the issue joined," &c., sufficiently shows that the oath prescribed by the statute was administered. *Moore v. State*, 424.
107. *Same.* — A recital in the record that the jury "were duly empanelled, sworn, and charged well and truly to try the issue joined between the defendant and the State of Alabama," sufficiently shows that the jury were sworn as required by law. *Blair v. The State*, 343.
108. *Same.* — A recital in the record that the jury, in a criminal case, were "sworn and charged well and truly to try the issue joined," sufficiently shows that the statutory oath was administered to them. *Bush v. The State*, 13.
109. *Empanelling jury; what ruling as to, not erroneous.* — A defendant on trial for a felony not capital who refuses to pass on jurors accepted by the State and put upon him in a body, and demands the empanelling of a jury as in capital cases, cannot complain on error that this was denied him, when it appears that the court allowed him opportunity, of which he failed to avail himself, to examine each juror separately as to qualifications and cause of challenge. *Sellers v. The State*, 368.
110. *Venire; what not ground for quashing.* — The want of qualification of any of the persons summoned as jurors is not ground for quashing the venire; neither is the fact that one or more of them were designated by the initial letters of their christian names instead of their full christian names, especially when defendant has not been thereby deceived or misled. *Fields v. The State*, 348.
111. *Disqualified juror; objection to, how waived.* — A party who knows of the want of qualification of a juror and accepts him nevertheless, or fails to make inquiry as to the matter, cannot afterward be heard to complain of such disqualification. *Brown et al. v. The State*, 345.
112. *Freeholder or householder; renting of land merely for one year does not constitute.* — A person who had merely "rented land for the last twelve months," is not a "freeholder" or "householder," within the meaning of § 4180 of the Revised Code. *Iverson v. The State*, 170.
113. *Challenge for cause; error in disallowing; when not cured by subsequent allowance of additional challenges.* — Error in disallowing a challenge for cause to a juror, thereon peremptorily challenged by a defendant, whose challenges were not then exhausted, will not be cured by allowing him to exhaust a greater number of peremptory challenges than given by law, it not appearing when the court made known its purpose to allow the extra number of challenges. *Ib.*
114. *Section 4180 of Revised Code not repealed by the act to amend § 4063 of Rev. Code.* — The act to amend § 4063 of the Rev. Code, approved December 31, 1868 (Acts 1868, p. 550), which requires the officers therein designated to select grand and petit jurors from the list of registered voters on file in the probate judge's office, observing strictly "all qualifications and restrictions in regard to competency and qualification as now provided by law," does not repeal § 4180 of the Rev. Code, which allows a challenge for cause, in a criminal trial, to one summoned as "a juror, and not a resident free-

CRIMINAL LAW — *Continued.* JURY — *Continued.*

- holder or householder for the preceding year." (BRICKELL, C. J., dissenting.) *Iverson v. The State*, 170.
115. *Discharge of juror for sickness; practice as to.* — The court quotes with approval the language in *Barrett v. The State* (38 Ala. 406), as to the caution to be observed in discharging a juror after evidence given. Where a juror is discharged "on complaint of being sick," the record should show that the court ascertained the truth of that fact before discharging him. *Robinson v. The State*, 587.

LARCENY.

116. *Ownership; what sufficient proof of.* — The ownership of timber cut on lands is properly laid in one who was in possession asserting title; and these facts, in the absence of evidence to the contrary, are sufficient proof of such averment, without the introduction of the title deeds, in a prosecution for larceny. *Morningstar v. The State*, 405.
117. *Larceny; constituent elements of.* — To constitute larceny it is not necessary that the taking should have been with the intent to appropriate the goods to the use of the prisoner; it is sufficient if there is a criminal intent to deprive the owner of his property. *Williams v. The State*, 411.
118. "Warehouse;" *what is, within meaning of § 3707 of Rev. Code.* — A covered structure, used for storing cotton bales, one side and end of which were planked up, and the others left open so that wagons could drive under to load and unload, which, together with two acres of land connected with it, was inclosed by a plank fence nine feet high, the gates of which were kept locked, constitutes a "warehouse," within the meaning of section 3707 of the Revised Code. *Hagan v. The State*, 373.

PERJURY. See CRIMINAL LAW, 81, 82.

PLEADING AND PRACTICE.

119. *Plea of former acquittal; what necessary to support.* — To support the plea of former acquittal it is not sufficient to put in evidence the record relied on, although it embraces the indictment on which judgment is pronounced. There must also be proof of the identity of the parties and the offence. A record showing a judgment quashing an indictment on demurrer is wholly worthless in support of a plea of former acquittal. *Faulk v. The State*, 416. See, also, *Smith v. State*, 407.
120. *Objection by prisoner; what he is held to consent to or waive.* — Wherever the prisoner makes an objection, — whether well founded in law or not, — to an indictment, he must be held to consent to that action of the court which would have been proper if the objection was well founded. *Ex parte Winston*, 419.
121. *Same; what does not work an acquittal.* — If the court sustains the prisoner's objections, and, adopting the erroneous view of the law urged by the prisoner, holds a perfectly valid indictment insufficient, and for that reason enters a *nolle pros.* and discharges the jury, against his objection, after the trial has been entered on, he cannot complain, or afterwards set up the discharge as unauthorized and illegal, and a bar to any further prosecution. *Ib.*
122. *Error of trying plea of not guilty and autrefois acquit together; when cured.* — If the defendant pleads not guilty and former acquittal at the same time, and without objection proceeds to trial on both, in a misdemeanor case, he waives the irregularity, and cannot complain if the jury pronounces on both pleas together. A failure to make the objection in a case of felony is not a waiver, and advantage may

CRIMINAL LAW—*Continued.* PLEADING AND PRACTICE—*Continued.*

be taken of the irregularity by motion in arrest of judgment or on error. *Faulk v. The State*, 415.

123. *Same.* — Where the defendants pleaded not guilty and former acquittal, and the court, in response to an inquiry whether it would try the plea of former acquittal first, informed them that "they might determine the matter for themselves, but it might not be best for them;" whereupon they consented to try both issues together, but objected, after the evidence was closed, to the trial of both issues at once, the consent will be regarded as induced by the intimation of the court, and will not amount to a waiver. This irregularity was cured, however, when no legal evidence is offered to support the plea of former acquittal. *Ib.*
124. *Election; when prosecutor will be compelled to make.* — Although an indictment is so framed as not to designate the particular transaction, or act to which it relates, or contains several counts charging the offence to have been committed in different ways, it includes but one offence; and if the State offers evidence of more than one, the defendant may compel the prosecutor to elect on which he will proceed. *Smith v. The State*, 384.
125. *Same.* — Election is compelled in such cases to prevent prejudice to the defendant by bringing in evidence of guilt of crimes for which he is not really indicted, and to avoid bolstering up a conviction on the offence charged by proof of other and different offences. *Ib.*
126. *Same.* — The principle has no application to a case where evidence is given of but a single well-defined criminal act done at a particular place, although such place, according to the testimony of different witnesses, may be stamped with the characteristics of one or more of the places at which gaming is prohibited. *Ib.*
127. *Discharge of one of several defendants under section 4192 of Revised Code; action of court under, when not revised.* — Section 4192 of the Revised Code, authorizing the discharge of any one of several joint defendants as to whom there is not sufficient evidence to put him on his defence, imposes delicate and responsible duties, in the exercise of which much must be left to the sound discretion of the lower court. Its action in this respect will not be revised when all the evidence is not set out, or where it is merely stated in general terms. *Gassenheimer v. The State*, 313.
128. *Defendants jointly tried; practice as to evidence admissible as to one only.* — Where defendants are jointly indicted and tried, declarations or other evidence criminating one alone cannot be excluded on motion of a co-defendant, because as to him the evidence is mere hearsay. The proper course is to ask instructions to the jury to weigh such evidence only in the case of the defendant against whom it is offered, and to disregard it entirely as to the others. *Alsabrooks v. The State*, 24.
129. *Leading question to prosecutor; discretionary with primary court.* — It is discretionary with the primary court to permit or refuse a leading question to be put by a party to his own witness, and the exercise of this discretion is not revisable. *Gassenheimer v. The State*, 313.
130. *Practice.* — It is not error for the court to inform counsel while addressing the jury that the court will charge the law to be different from what counsel states it. *Sellers v. The State*, 368.
131. *Practice; error without injury.* — Declining to decide upon a demurrer to the indictment until the testimony is closed is a practice not to be encouraged; but such a ruling is not ground for reversal when it appears that the defendant, represented also by counsel, first pleaded not guilty, and then demurred, and afterwards had the benefit of all

CRIMINAL LAW — Continued. PLEADING AND PRACTICE — Continued.
the points raised on demurrer, on motion in arrest of judgment.
Childs v. The State, 14.

182. *Capias*; *what irregular*. — Where a *capias* issues during the term, on indictment then found, it should not direct that defendant be committed to answer, &c., at the next term. The defendant is entitled to a disposition of his case during the term then being held, if possible. *Lee v. The State*, 321.

PRELIMINARY PROCEEDINGS BEFORE JUSTICES.

133. *Preliminary proceedings before justice; what not essential on*. — Technical accuracy is not to be exacted on preliminary proceedings before justices of the peace for violations of the criminal laws. If the language employed, according to its ordinary acceptation, will enable a court to gather from it that an offence against the criminal laws has been committed, the process cannot be held void. *Rhodes v. King*, 272.
134. "*Act to regulate confinement and discharge of persons charged with misdemeanors*;" *to what applies*. — "The act to regulate the confinement and discharge of persons charged with misdemeanors," approved December 11th, 1873, applies as well to proceedings before a justice of the peace as to prosecutions before the county and circuit courts. *Avery v. The State*, 340.

RECEIVING STOLEN PROPERTY.

135. *Receiving stolen goods; what may authorize inference of guilt*. — Where a man engaged in trade is found in possession of stolen goods under suspicious circumstances, and declares that he knows, or has the means of ascertaining, the person from whom he received them, out of the ordinary course of business, his failure to take any steps to point out such person is a potent fact from which the jury may well draw the inference of guilt. *Adams v. The State*, 379.
See **CRIMINAL LAW**, 46.

REVENUE LAW, VIOLATIONS OF.

136. *Retailing without license under section 3618 of Rev. Code; what constitutes*. — A restaurant keeper, regularly licensed as such by the city of Montgomery, having a wholesale, but no retail, license from the State, who sells vinous liquors only to persons taking meals at his restaurant, the liquors being drunk by them only while eating, is guilty of an indictable offence under section 3618 of the Revised Code. *Nicrosi v. The State*, 336.
137. *License, when required*. — It is an essential inquiry in prosecutions for "engaging in, or carrying on business" without license, whether the defendant intended to derive — either directly or indirectly — a profit or means of livelihood from the acts imputed to him. If so, a license is necessary, whether such profit was realized or not. *Weil v. The State*, 19.
138. *Same*. — A single act pertaining to a particular business will not constitute the "engaging in or carrying on" the business; yet a series of such acts will. *Ib.*
139. *License under revenue law; taking out, after beginning of year, effect of*. — Under the Revenue Law of 1868, a license taken out and paid for after the first day of the year, and covering the whole of the year, is no protection against an indictment, afterwards found, for acts done in that year prior to the actual issue of the license. *Elsberry v. The State*, 8.
140. *Corporation engaging in business without license; who may be convicted therefor*. — The superintendent or person conducting the business of

CRIMINAL LAW — *Continued.* **REVENUE LAW, ETC.** — *Continued.*

a corporation — although he does none on his own account, and acts simply as its servant — may be convicted and punished for carrying on such business without license, if neither he nor the corporation had taken out a license. *Elsberry v. The State*, 8.

See **CRIMINAL LAW**, 96.

TRIAL. See **CRIMINAL LAW**, 97, 119-131.

RAPE.

141. *Conviction may be had on uncorroborated testimony of prosecutrix.* — Although a woman be of ill-fame for chastity she is still under the protection of the law, and there is no principle of law which forbids a conviction on her uncorroborated testimony alone, if the jury, after carefully weighing and scrutinizing it, are convinced of its truth. *Boddie v. The State*, 395.

142. *Want of chastity of prosecutrix.* — It is competent in all prosecutions for rape to impeach the character of the prosecutrix for chastity; but this is usually done by evidence of her reputation in this respect, and not by proof of particular acts of unchastity. *Ib.*

ROBBERY. See **CRIMINAL LAW**, 91.

VENUE.

143. *Venue; sufficiency of proof as to.* — Where the evidence reasonably conduces to prove the venue, the appellate court will not pass upon its sufficiency, unless that question was raised in the court below. *Elsberry v. The State*, 8.

144. *Venue; proof of, should be shown by bill of exceptions.* — Comments of the court on the necessity of bills of exceptions professing to set out all the evidence containing the testimony in respect to venue. *Walker v. The State*, 192.

WITNESS. See that title.

DAMAGES. See **ERROR AND APPEAL**, 28.

DEEDS.

1. *Acknowledgment of deed; effect of.* — Where two only of three signers of a deed are mentioned therein as grantors, and they, alone, acknowledge its execution, this dispenses with all further evidence of its execution by them. *Hendon v. White*, 597.

2. *Title deeds; when not presumed to be in possession of purchaser.* — The title deeds of a defendant whose estate has been sold and conveyed under compulsory legal process, are not presumed to be in the possession or under the control of the purchaser. *Ib.*

3. *Same.* — In such case the purchaser, under our statutes, need only produce a certified transcript of the record of such deeds, without accounting for the originals. *Ib.*

4. *Conveyance of land; what essential to.* — Under the provisions of the Revised Code, no conveyance is effectual to pass real estate, unless attested by one, and where the grantor cannot write, by two witnesses, or acknowledged before a proper officer. *Ib.*

5. *Acknowledgment of ineffectual conveyance; to what will not relate.* — The subsequent acknowledgment of an ineffectual conveyance to a voluntary grantee, will not relate back to the signing and delivery of the deed, so as to prejudice the rights of execution creditors. *Ib.*

DETINUE. See **ACTION**, 11.

DOWER.

1. *Dower; consideration for renunciation of.* — The wife, as the consideration on which she will renounce her right of dower, may require a consideration enuring solely to her; if she fail to exact this, her re-

DOWER — Continued.

lease will be good if supported by an adequate consideration moving to the husband alone. *Bailey v. Litten*, 282.

2. *Same.* — A verbal promise to the husband by one who had purchased his lands at mortgage sale, that if the husband and wife would execute a quitclaim deed to these same lands, which were then about to be sold under executions the lien of which was superior to the mortgage, the promisor would purchase at that sale also and give the husband better and easier terms of redeeming than allowed by law, is a sufficient consideration moving to the husband to support the wife's release of dower. This consideration may be shown notwithstanding the deed express a nominal consideration in dollars. *Ib.*

EJECTMENT.

Ejection; what purchaser at execution sale must show, to maintain. — In ejection by a purchaser at execution sale, he must show that the defendant in execution had some interest or estate in the lands sold on which the judgment could operate. *Hendon v. White*, 597.

See ACTION, 4, 8.

ELECTION.

1. *Election to retain advancements; what does not establish.* — Verbal declarations of a distributee after the death of the intestate, that he had received a full share and would retain it and not claim any more, and proof that partial distributions were made by him, as administrator of the intestate, in which he made no claim to share, do not, of themselves, establish an election to retain advancements and waive any claim to share in the distribution. *Key v. Jones*, 238.
2. *Same.* — Whether the statutory mode of making such election precludes all others is not decided; but such election, if it can arise by matters *en pais*, must be by clear, unequivocal acts, with a full knowledge of all the circumstances and the party's rights. Mere intention to elect, casual declarations or loose conversations, will not suffice, especially when not acted on to the prejudice of another. *Ib.*

See CHANCERY 21.

ERROR AND APPEAL.**I. WHEN APPEAL LIES.**

1. *When will not lie.* — An appeal will not lie from an order of the circuit court overruling a motion of a defendant to discharge him from custody and quash a *capias* issued on indictment for an offence, to answer which he had been bound over by a magistrate and given bond before indictment found. *Lee v. The State*, 321.
2. *Same.* — No appeal lies from an order of court imposing payment of costs as the condition upon which a new trial is granted. The effect of such order, so long as it stands, is to suspend execution of the judgment and deprive it of its properties of a final decree which will support an appeal. *Tannenbaum v. Tankersly*, 489.
3. *Same.* — A decree in chancery which settles only a portion of the equities between the parties is not such a final decree as will support an appeal. *Randolph v. Moore*, 530.
4. *Same.* — An appeal does not lie from the order of the probate judge revoking and annulling letters of apprenticeship. *McKimney v. McKimney*, 102.
5. *Same.* — On appeal under section 2759 R. C., the appellate court can revise such only of the adverse rulings compelling nonsuit, as are properly made matter of exception and reserved by bill of exceptions. *Wyatt v. Evins*, 285.
6. *When lies.* — The order which the circuit judge makes to compel the

ERROR AND APPEAL — Continued. WHEN APPEAL LIES—Continued.

- delivery of books and property in the statutory proceeding is of like nature with *mandamus*, and is embraced in the general words, other "remedial writs," used in the act of December 15, 1868, authorizing appeals from "judgments of circuit court judges on application for *mandamus* and other remedial writs." *Thompson v. Holt*, 491.
7. *Same.* — Where, at the instance of the purchaser at a sale of mortgaged property, under a decree of foreclosure, a writ of possession issues against a stranger in possession, he may appeal; but the appeal must be prosecuted against the purchaser alone. *Thompson v. Campbell*, 588.
 8. *Appeal, matter of right, not controllable by chancellor.* — An appeal in a proper case is matter of right, and when taken from a decree for payment of money, the register must ascertain at his peril whether to allow it. Orders or instructions from the chancellor, prohibiting the granting of the appeal, are void, and will not protect the register, if he disallows an appeal in a proper case. *Moore v. Randolph*, 581.

II. PRACTICE.

9. *Dismissal of appeal.* — A motion to dismiss an appeal for want of a certificate of appeal comes too late after joinder in error, if the case is one of which the supreme court can take jurisdiction by appeal. *Killam v. Costley*, 82.
10. *Same.* — Our laws and practice do not favor the dismissal of causes from the appellate court for defective appeals which may be amended. In the present cause two appeals were taken to the same term from the same final decree, one merely giving bond for costs, the other superseding the same final decree and an order confirming a sale under it. Both appeals were defective for want of proper parties. On motion to dismiss and counter motion for leave to amend, the court dismissed the first appeal, but retained the cause under the last, with leave to appellants to perfect the appeal on application during the term. *Kidd v. Turner*, 251.
11. *Same.* — Where the appeal bond misdescribes the decree from which the appeal is taken, or where there is no certificate of appeal, the appeal is defective. These defects are amendable under the Revised Code (§§ 4420–21), and the appellant will be allowed a reasonable time to perfect his appeal before it will be dismissed. *Thompson v. Campbell*, 588.
12. *Presumptions on appeal.* — Where a demurrer is improperly sustained to a special plea, the presumption of injury arises compelling a reversal, unless it clearly appears that the party interposing the plea not only could have had, but did have, under some other plea the benefit of the defence set up by his special plea. *Rhodes v. King*, 272.
13. *Same.* — The appellate court will not presume that the complaint was amended by the addition of a certain count, from the mere fact that leave was given so to amend, if such presumption will militate against the judgment below. *Malone v. Hundley*, 147.
14. *Same.* — On appeal, where it does not appear that any effort was made, by an offer to amend, to avoid dismissal of the bill, after sustaining a demurrer, it will be presumed that the complainant did not desire to amend. *Little v. Snedecor*, 167.
15. *Same.* — Where it may as well be inferred from the testimony that persons were joint contractors in a farming adventure as that they were partners *inter sese*, it will not be presumed that a crop of cotton, an undivided half interest in which was mortgaged by one of them, was partnership property, so as to defeat trover by the mortgagee against a stranger for a conversion. *Broughton v. Atchison*, 62.

ERROR AND APPEAL — *Continued.* PRACTICE — *Continued.*

16. *Same.* — A party introducing evidence on the examination in chief, of drawing it out on cross-examination, thereby affirms its admissibility, and cannot afterwards move to exclude it; and in the absence of recitals in the bill of exceptions showing to the contrary, it will be presumed, to sustain the ruling of the court below, that the evidence was offered by the party excepting. *Hughes v. Taylor*, 518.
17. *Same.* — Whenever a demurrer is improperly sustained to one or more special pleas, the presumption of injury arises, and will compel a reversal, unless the court can clearly see from the record that the party interposing such special pleas not only could have had, but did have, under some other plea, the benefit of the defence set up by his special pleas. *Eads v. Murphy*, 520.
18. *Same.* — The chancellor's finding upon facts will not be reversed merely because the appellate court cannot see that the decree is right; it must be satisfied that it is wrong. The presumption in favor of the judgment of the court below prevails as well to its findings upon the facts as to its rulings upon the law. *Marlow v. Benagh*, 113.
19. *Practice.* — Where illegal evidence has been admitted a reversal must follow unless the court can clearly see that the illegal evidence could not prejudice the defendant. *Jackson v. The State*, 305.
20. *Same.* — The court, while desirous of the aid to be derived from briefs of counsel, does not feel at liberty to decline considering questions presented only by an assignment of error. *Corbitt v. Clenny*, 480.
21. *Repeal of statute on which action was based pending appeal; practice on reversal.* — The court declined to pass upon the effect of a repeal of the statute, on which the action was based, during the pendency of the appeal, and on reversal, remanded the cause. *Luke v. Calhoun County*, 115.
22. *Practice disapproved.* — The court condemns the practice pursued in this case, in regard to the pleadings, as calculated to entail trouble upon the court and produce confusion in the administration of justice. *Thrower v. The State*, 22.
23. *Error; what not ground of.* — It cannot be assigned for error that a judgment rendered on, and corresponding with, the verdict, is for a greater amount than claimed in the complaint. The remedy in such a case is by motion for a new trial in the court below. *Dudley v. Linn*, 65.
24. *Same.* — The refusal to charge the jury to acquit the defendant if they believe the evidence cannot be revised when all the evidence is not set out in the bill of exceptions. *Avery v. The State*, 341.
25. *Same.* — The refusal of a charge that "arguments and fancies of counsel are not law" cannot be revised on error, unless the record discloses the argument and fancies referred to. *Boddie v. The State*, 395.
26. *Same.* — A mere general exception to an entire general charge, enunciating several distinct propositions of law, cannot be supported unless the charge as a whole is erroneous. *Owens v. The State*, 400.
27. *General charge; when exception to, not available.* — A mere general exception to a charge, containing separate charges or instructions, given by the court of its own motion, will not require this court to scrutinize the charge. Unless it is wrong as an entirety, the exception is not available. *Chatteaux v. State*, 388.
28. *Damages on affirmance.* — The court declines to depart from the long established practice of awarding only five per cent. damages on affirmance of a judgment for payment of money, which has been superseded under section 3489 of Rev. Code. *Chambers v. Wright*, 444.

ERROR AND APPEAL — *Continued.* PRACTICE — *Continued.*

29. *Res gestæ*; admitting testimony as, when not revised. — Declarations made by the party beaten to a third person, in the absence of the prisoner, as to the circumstances of the assault, may under some circumstances constitute part of the *res gestæ*; hence where all the evidence is not set out, and the statements in the bill of exceptions, without being definite, produce an impression that there was a nearness of both time and space between the assault and declarations, the appellate court cannot say that it was error to admit them. *Smith v. The State*, 408.
30. *Answer*; when disregarded. — The appellate court, in reviewing an order dissolving an injunction, will not notice the denials of the answer, couched in language like the following: "Defendant denies the truth of the first eight and a half lines of paragraph two of the bill," and also "the truth of the first sixteen lines of section 4 of the bill," and the like. *Walker v. Tyson*, 593.
31. *Same*; how construed. — An averment of the bill that an estate, of which a party was the administrator, "is wholly insolvent" will be construed to mean that the estate has been duly reported and declared insolvent, if such construction militates against the complainant, or is necessary to uphold the chancellor's decree. *Ib.*
32. *Chancellor's decree on facts*; when reversed. — The chancellor's decree on controverted facts will not be disturbed unless it clearly appears that he has erred. When the decree is in opposition to material testimony not controverted, it cannot be allowed to stand; the error then being not an error of fact, but as to the legal effect of facts not disputed. *Daniel v. Hill*, 431.

ESTATES OF DECEDENTS.

1. *Decedent's land*; jurisdiction of probate court over. — The jurisdiction of the probate court to order a sale of a decedent's lands for payment of debts is *in rem*, and attaches upon the filing of an application by a proper party alleging a statutory ground of sale. *Doe ex dem. Hamilton v. Hardy*, 291.
2. *Order of sale*; what will not invalidate, on collateral assault. — Looseness or inaccuracy of pleading in the allegation of jurisdictional facts, would be bad on demurrer, but capable of amendment, while the proceedings are *in fieri*, will not avoid the decree of sale when collaterally assailed. *Ib.*
3. *Same*. — A decree of sale cannot be avoided, on a collateral attack, because the lands were described, both in the petition and order of sale, merely by section, township, and range. In such a case it is admissible to show by parol that the lands lay within the jurisdiction of the court. *Ib.*
4. *Same*; as to sale of lands descended to minor. — An order of sale of lands, descended to an infant or person of unsound mind, made without ascertaining the necessity, by proof of disinterested witnesses taken by deposition as in chancery cases, is void. But where the court has obtained jurisdiction by the filing of a proper petition, and its record recites that the court ascertained the necessity for a sale by proof of disinterested witnesses, taken by deposition as in chancery cases, errors in determining that the depositions were taken as in chancery cases, or that they proved the necessity for a sale, and the like, are mere errors and irregularities after jurisdiction attached, and cannot avoid the decree except on revision on appeal. *Pettus v. McClannahan*, 55.
5. *Sale of decedent's lands*; when jurisdiction of probate court attaches. — The jurisdiction of the probate court to order a sale of a decedent's lands for payment of debts is *in rem*, and attaches upon the filing of a petition containing the jurisdictional allegations. *Ib.*

ESTATES OF DECEDENTS — *Continued.*

6. *Order of confirmation of sale of decedent's lands ; when void.* — Where a sale of a decedent's lands in a body has been made under order of the probate court, and regularly reported to and confirmed by it, an order to convey title to any portion of it before the entire purchase-money has been paid is a nullity. *Corbitt v. Clenny*, 480.

See EXEMPTIONS, 2.

ESTOPPEL.

1. *Estoppel ; sale of decedent's lands.* — The administrator *de bonis non*, creditors, and others interested in a decedent's estate, are estopped from questioning the validity of an order of sale of his lands, the fairness of the sale not being impeached, if they have treated the purchase-money as assets, received the benefit of it, and it has been fully accounted for on final settlement by the administrator in chief. *Bell v. Craig*, 215.
2. *Estoppel.* — One who has contracted with the administrator in his representative capacity cannot, when sued by him on the contract, plead *ne unques administrator*. *Hill v. Huckabee*, 155.

See VENDOR AND PURCHASER, 3.

EVIDENCE.

I. ADMISSIBILITY AND RELEVANCY.

1. *Action on promissory note ; what evidence inadmissible.* — In an action on a promissory note, the issue being whether the plaintiff had agreed to receive eight per cent. Confederate bonds in payment, she cannot be permitted to prove by a witness who was her debtor during the war that he did not offer to pay because he knew that she refused to receive Confederate money. Such evidence is irrelevant, and calculated to mislead the jury. *King v. Mitchell*, 557.
2. *Same ; what evidence inadmissible.* — On such an issue proof that the plaintiff during the war refused to accept payment of a large debt in Confederate money from a debtor who came from a distance, and proof of declarations by her "that she would not accept Confederate money or bonds in payment of debts due her," — the defendant not being present, or in any way connected therewith, — is merely proof of her own acts and declarations in her own favor, irrelevant to the issue, and wholly inadmissible against the defendant. *Id.*
3. *Evidence ; what irrelevant.* — In an action to recover the price of shares of stock sold and delivered to defendant — the issue being as to the sale and delivery and plaintiff's ability to sell and deliver — a certificate of shares of stock in favor of plaintiff's wife and minor children, which he had no authority to sell and transfer and had not transferred, is irrelevant and incompetent evidence on the part of the plaintiff. *Darden v. Lovelace*, 289.
4. *Evidence ; what irrelevant.* — Proof that third persons used some of the same kind of guano as that for the price of which defendant is sued, and that it was "worthless," is irrelevant ; so also is proof that the guano had never been inspected — the inspection laws having been enacted after the sale. *Preston v. Dunham*, 217.
5. *Evidence of heirship ; what competent.* — In unlawful detainer by the heirs against one who entered under a lease from the administrator, they may introduce the record of his final settlement, on which they were represented as heirs, to prove heirship. *Latonette's Heirs v. Lipscomb*, 570.
6. *Evidence ; separate estate, how shown.* — If husband and wife mortgage lands of her ancestor, purchased at a sale for division, to the sureties on her notes for the purchase-money, reciting such sale, her purchase, and that the mortgage is given to indemnify such sureties,

EVIDENCE — Continued. ADMISSIBILITY, ETC. — Continued.

- such mortgage is admissible evidence to show a separate statutory estate in her to the lands therein conveyed. *Pippin v. Jones*, 161.
7. *Personal identity; when photograph admissible evidence to show.* — A photograph, shown by the widow to be a good likeness of her husband, and an indorsement thereon, in his handwriting, of his name, date, and place of its execution, are admissible evidence to show the identity of the husband and a murdered man, when offered in connection with the testimony of the photographer, that it was the likeness of a man of the same name as the husband, taken at the place and about the time indorsed on it, and the further evidence of a witness, who saw deceased shortly before and after death, that it was a good likeness. *Luke v. Calhoun County*, 115.
 8. *Decree of insolvency; when incompetent evidence.* — A decree of the probate court declaring the assured's estate insolvent is not evidence of his insolvency in a suit by his children, beneficiaries under the policy, against the insurance company. *Brooklyn Life Ins. Co. v. Bledsoe*, 538.

II. PAROL AND WRITTEN.

9. *Varying written contract by parol; what evidence without the rule against.* — In trover for conversion of mortgaged property, the defendant may show by parol that prior to the execution of plaintiff's mortgage, the mortgagor, for valuable consideration, had given defendant a right to receive and sell the property, satisfy certain debts, and return the surplus, and that this was made known to plaintiffs by the mortgagor, who refused to execute the mortgage without the defendant's consent, which was given upon mortgagees' consenting to the arrangement. *Holland v. Kimbrough*, 249.

III. PRESUMPTIONS. — JUDICIAL NOTICE.

10. *Residence; presumption as to.* — Residence or non-residence is a fact in its nature continuous, and when once proved to exist, will be presumed to continue until the contrary is made to appear. *Daniels v. Hamilton*, 105.
11. *Judicial notice taken of photography.* — The courts will judicially notice the art of photography, the mechanical and chemical process employed, the scientific principles on which they are based, and their results. *Luke v. Calhoun*, 115.

For questions relating to Criminal Law, see that title.

EXECUTION.

1. *Same; validity of sale since war under judgment during war.* — A sale of land under a *pluries* execution, issued since the war on a judgment rendered during the war, is valid, and will pass the title of the defendant in execution; and he not questioning the validity of the process, a third person cannot collaterally attack a sale under the execution, on the ground that *scire facias* was necessary to authorize execution. *Parks, Brewer & Co. v. Coffey*, 33.
2. *Priority of right between purchaser at execution sale and attaching creditor.* — When an *alias fi. fa.* issues, followed up, without the lapse of a term, by a *pluries* execution under which a sale is made, the purchaser's title is superior to the lien of a creditor who attached the land in the interval elapsing between the issue of the *alias fi. fa.* and the sale under the *pluries* execution. *Ib.*
3. *Sale of land after defendant's death; when valid.* — Section 2875 of the Revised Code authorizes a sale of the defendant's land after his death, under an *alias* or *pluries fieri facias*, when the writ was received by the sheriff while defendant was in life and has been regularly kept up without the lapse of an entire term. *Hendon v. White*, 597.

EXECUTORS AND ADMINISTRATORS.

1. *Administrator; cause for removal of.* — The payment by an administrator of his own debt out of the funds of the estate is a breach of trust, for which he may be removed. *Killam's Heirs v. Costley*, 85.
2. *Same; when should not be removed.* — Where, however, the interest of those concerned in the estate has not been imperilled by the amount used, which was small in comparison with the funds remaining in the administrator's hands, and no improper or dishonest motives can be imputed to him, he should not be removed. *Ib.*
3. *Administrator; when not liable for Confederate currency perishing on his hands.* — An administrator, exercising diligence, prudence, and good faith in the acceptance of Confederate currency in payment of a debt due his intestate, should be allowed a credit for it, although the currency perishes on his hands, if he has not commingled it with his own funds or been guilty of negligence or bad faith in not paying it out. *Key v. Jones*, 238.
4. *Administrator of insolvent estate; authority of.* — The administrator of an insolvent estate has no authority to agree to receive a note made by his intestate to a third person in payment of, or as a set-off against, the price of property of the estate which he, as administrator, was selling. *Walker v. Tyson*, 593.
5. *Administration account; what no part of.* — Where the intestate's lands are sold under written agreement of the heirs, part of the price being paid in cash and the remainder in notes made payable to, and received by the heirs in payment of their respective shares, the proceeds of such sales or notes are not proper matters of the administrator's accounts, and he is not entitled to commissions thereon. *Key v. Jones*, 238.
6. *Administrator, compensation of; by what law governed.* — The administrator's compensation is governed by the law of force at the time the services were rendered and not by the law as it stood at the time of his appointment or settlement. *Ib.*
7. *Ancillary administration; dignity of; when will decree distribution.* — Ancillary administration here upon the estate of a citizen of a sister State, dying there intestate, is in no proper sense dependent upon the domiciliary administration. Whether the court here should decree distribution or remit the property abroad is matter not of jurisdiction, but of sound judicial discretion, dependent upon the peculiar circumstances of each case. *Fretwell v. McLemore*, 124.
8. *Section 2091 R. C., bar of; how computed.* — The statutory bar in favor of sureties of executors, administrators, and guardians, is to be computed from the judicial ascertainment of the principal's default, and not from the date of the actual misfeasance or malfeasance for which the surety is sought to be charged. *Ib.*
9. *Non-claim, statute of; operation upon claims of heirs and legatees.* — The claim of heirs or legatees against the estate of a surety, growing out of the misfeasance or malfeasance of his principal, whether judicially ascertained or not, is barred if not presented to the administrator of the surety within eighteen months. *Ib.*
10. *Same; what claims excepted from.* — The claim of "heirs or legatees claiming as such," excepted from the statute of non-claim, is the claim of title, whether derived from the statutes of descents and distribution or by will, to property of the estate — the right to the specific property in the hands of the administrator, unadministered and unconverted, as contradistinguished from a claim for a *devastavit*, or for a default creating merely the relation of debtor and creditor. *Ib.*
11. *Non-claim; what sufficient to prevent bar of.* — Suggestion upon the record of defendant's death and an order of revivor upon *scire facias* to his administrators, the writ being served within eighteen months

EXECUTORS AND ADMINISTRATORS — Continued.

after the grant of administration, is a sufficient presentation to save a claim from the bar of the statute of non-claim of eighteen months. *Malone v. Hundley*, 147.

See **ESTOPPEL**, 1, 2.

EXEMPTION.

1. *Exemption; how claimed and what not waiver of.* — A defendant in execution may claim property as exempt at any time before sale, and does not waive or lose this privilege by giving a bond for the forthcoming of the property after the levy on it. *Daniels v. Hamilton*, 105.
2. *Exemption; what law governs.* — The laws in force at decedent's death govern as to the amount and kind of property exempt from administration for the benefit of the family. *Taylor v. Pettus*, 287.

FRAUDS — STATUTE OF FRAUDS.

1. *Contract, rescission of on ground of fraud; allegations as to.* — He who seeks the rescission of a contract on the ground of fraud or undue influence must show his right to relief by distinct and pointed allegations clearly proved. *Bailey v. Litten*, 282.
2. *Fraud, badges of.* — A sale and conveyance to a blood relative; the smallness of the price paid; the dominion or control exercised over the property sold, and the like, are badges of fraud, but not conclusive proof of it, and may be explained. *Marshall v. Croom*, 554.
3. *Same; vendee's participation in, necessary to vitiate conveyance.* — Fraudulent acts or intent on the part of the vendor, not participated in, or known to, the vendee, will not authorize a decree setting aside the deed as one made with intent to hinder, delay, or defraud creditors, *Ib.*
4. *Fraud and undue influence; what does not constitute.* — Mere persuasion, unaccompanied by falsehood, undue concealment, or delusive promises, or by any violence, duress, or constraint, constitutes neither fraud nor undue influence. *Bailey v. Litten*, 282.
5. *Statute of frauds; contract not to be performed within a year.* — A verbal contract entered into on the 21st day of December, 1870, whereby plaintiff agreed to serve as clerk for defendants for a year, commencing on the day thereafter and ending on the 22d day of December, 1871, is a contract to be performed within a year and therefore not within the statute of frauds. *Dickson v. Frisbee*, 165.

GENERAL ASSEMBLY.

1. *Adjournment; resolution as to, force and effect of.* — A joint resolution was adopted by both houses of the general assembly without having been read on three several days in each house or presented to or approved by the governor, providing that when the two houses adjourned on the 17th day of December, 1874, they should stand adjourned until the 15th day of January, 1875: "provided that no member of the general assembly shall be entitled to receive mileage in going to and returning from his home:" *Held*, 1st. It was not necessary that the resolution should be read on three several days in each house, nor that it should be presented to, or approved by, the governor. 2d. The proviso was germane to the resolution. 3d. Under the constitutional provisions in regard to adjournments, the resolution, although not strictly a law, had the force of law, and suspended, as to that adjournment, section 49 of the Revised Code, which, as construed in *Ex parte Pickett* (24 Ala. 91), entitled members to mileage in going to and returning from their homes during recess. 4th. The resolution was binding upon all the members,

GENERAL ASSEMBLY — *Continued.*

- whether they voted for or against its passage. *Ex parte Matthews* 51.
2. *Session of general assembly; what constitutes.* — The sittings of the general assembly, although extended in the constitutional mode beyond thirty days, and an adjournment takes place for a recess of several weeks, constitute but one session. *Ib.*
 3. *What not exercise of judicial power by.* — The legislature may, without exercising judicial power, declare what causes "shall" entitle a party to transfer a case from one court to another of coordinate jurisdiction, so long as it leaves the ascertainment of such cause for judicial determination. *Ex parte Hickey*, 228.

GUARDIAN AND WARD. See WILLS.

HABEAS CORPUS. See that title under CRIMINAL LAW.

HUSBAND AND WIFE.

1. *Husband, how becomes indebted to wife and how may secure indebtedness.* — If the husband converts the wife's statutory separate estate, he becomes indebted to her to the amount used, and although insolvent and largely indebted, may secure such debt by a mortgage of property to a trustee for her; and the conveyance, if made *bonâ fide*, is valid against the husband's creditors. *Northington v. Faber*, 45.
2. *Mortgage to secure wife; what she takes at purchase under.* — Where the wife purchases under the mortgage, at a sale made in pursuance thereof, and a conveyance is executed to her, the legal title vests in her, and such property is her statutory separate estate. *Ib.*
3. *Married woman; capacity to purchase lands.* — The purchase by a married woman of her ancestor's land, under a decree in chancery for division, confers upon her a statutory separate estate, at least, until she elects to repudiate it in a proper way. *Pippin v. Jones* 161.
4. *Same; improper mode of electing to repudiate purchase.* — Setting up as a defence against a proceeding to condemn the land for articles of comfort, &c., the wife's incapacity to purchase it, is not a proper mode of manifesting her election. *Ib.*
5. *Equitable separate estate; what creates.* — A conveyance of real and personal property to a married woman "absolutely and in her own right," to have and to hold "to her, her heirs, and assigns, for her own separate and absolute use and behoof forever, in fee simple," creates an equitable separate estate. (Overruling on this point *Molton v. Martin*, 43 Ala. 651; *Glenn v. Glenn*, 47 Ala. 204; *Denechaud v. Berry*, 48 Ala. 591.) *Short v. Battle*, 456.
6. *Same; rights of wife as to.* — The wife must be regarded in equity as a *feme sole* with respect to her equitable separate estate, having capacity to bind or charge it by her contracts, and to alienate or otherwise dispose of it. She may mortgage it as security for her own debt, or that of another. *Ib.*
7. *Equitable separate estate; what construction determines.* — Where by the gift or devise the intent to exclude the marital rights of the husband clearly and unequivocally appears from the force and certainty of the terms employed, an equitable separate estate is created. *Ib.*
8. *Statutory separate estate; what construction determines.* — Where the intent to exclude the marital rights of the husband is doubtful or equivocal, or rests on speculation, the statute intervenes and fixes the character of the estate as the separate statutory estate of the wife. *Ib.*
9. *Separate estate; liable for necessities furnished family servants.* — Servants necessarily employed and residing in the family are part of the "household," within the meaning of the statute, and necessities

HUSBAND AND WIFE — *Continued.*

purchased for them can be charged upon the wife's statutory separate estate. *Pippin v. Jones*, 162.

10. "*Subjecting to sale separate estate of married woman*;" what is not within meaning of act of March, 9, 1871. — Neither the use of moneys of the wife's statutory separate estate in permanent improvements on the husband's lands, nor his executing a trust deed on them to secure a debt due her, constitute them her statutory separate estate. On bill filed by the wife to subject the lands to her demands, a decree ordering a sale to pay the trust deed, but subordinating the claim for money used in improving the land to a mortgage given by the husband to a third person, is in no proper sense a "subjecting to sale the separate estate of a married woman," entitling her to an appeal and *supersedes* without security, under the act approved March 9, 1871. *Coleman v. Smith*, 259.

See ACTION, 7; DOWER, 1, 2.

INFANT. See WILLS, 2, 3, 11, 12, 14.

INJUNCTION. See CHANCERY, 8, 9, 14; OFFICE, 8.

INTEREST. See CHANCERY, 23.

JUDGMENTS. See COURTS, 1, 3, 4; EXECUTION, 1, 2, 3.

JUDICIAL POWER.

Power; when judicial. — A power is judicial, or in its nature judicial, when it involves the exercise of judgment and discretion; is to be exercised only in an ascertained event and on the concurrence of particular facts, the existence of which must be determined by the officer intrusted with the execution of the power. *Ex parte Thompson*, 98.

See GENERAL ASSEMBLY, 3; MANDAMUS, 1, 2.

JUSTICE OF THE PEACE. See COURTS, 8; CRIMINAL LAW, 133.

LANDLORD AND TENANT.

1. *Landlord and tenant; what does not create relation of.* — The relation of landlord and tenant does not exist between vendor and vendee, where the vendee enters into possession under an executory contract of purchase, and makes default in the payment of the purchase-money; nor does such default entitle the vendor to elect a rescission of the contract, and treat the vendee as a tenant liable for rent. *Tucker v. Adams*, 254.
2. *Landlord; what cannot mortgage.* — The landlord has no such interest in or title to crops grown on the rented lands as can be made the subject of a valid mortgage by him. *Broughton v. Powell*, 123.
3. *Landlord's remedy by attachment, who cannot pursue.* — The statutory provisions giving the landlord a lien on crops grown on rented premises, and a remedy by attachment, &c., cannot be pursued by one to whom he transfers the rent note. *Foster v. Westmoreland*, 223.

See COMPUTATION OF TIME, 1, 2.

LEGACY. See WILLS, 11, 12.

LIFE INSURANCE.

1. *Insurance on life of husband; how far statute protects.* — The statute authorizing insurance on the life of the husband for the wife's benefit, the premiums being paid by him, exempts from claims of creditors only so much insurance as is paid for by such premiums to the extent of five hundred dollars per annum. If the aggregate amount of annual premiums paid out of the husband's funds exceed five hun-

LIFE INSURANCE — *Continued.*

- dred dollars, the excess of insurance is liable for the payment of the husband's debts, without regard to the number of policies by which the insurance is effected. *Stone v. Knickerbocker Life Ins. Co.* 589.
2. *Policy of life assurance ; what not void.* — A policy of life insurance is not void for uncertainty because the beneficiaries are designated only as "children of John Wilson Bledsoe." *Brooklyn Life Ins. Co. v. Bledsoe*, 538.
 3. *Same, action on ; what evidence inadmissible.* — Declarations made by the assured after his premium fell due, in the course of a partnership settlement in which he had charged himself with partnership debts collected, that he made the collections to pay the premium, but did not because he was informed by the secretary of the defendant that his policy was cancelled, are mere hearsay, and wholly inadmissible evidence in an action on the policy. *Ib.*
 4. *Same.* — Evidence that the assured spoke of the premium coming due, and mentioned the source from which he expected to obtain money to pay it, and that the witness offered to loan the requisite amount, which offer the assured said he would take if disappointed, is also mere hearsay, and inadmissible testimony for the plaintiffs in an action on the policy. *Ib.*
 5. *Ability to pay premium ; when evidence of, admissible.* — Evidence of the ability of assured to pay the premium when it fell due, would be admissible in connection with evidence showing a legal excuse for non-payment. *Ib.*
 6. *Cancellation of policy ; effect of.* — The plaintiff proved payment of the first premium on a policy of life insurance to defendant's agent, and introduced a letter written by the secretary of defendant in answer to the assured's request for an extension of the time in which to pay the second premium, stating that the policy had been cancelled on the books of the company because no payment had ever been made on it, and requesting him if he had made payment to a deceased agent to send the defendant company a certified copy of the receipt, and to state when, where, and to whom the premium had been paid, as no payment had been sent the company, and it had no record of the payment of any premium. *Held*, 1. The cancellation of the policy on the books of the company did not amount to a rescission of the contract, or of itself affect the validity of the policy or the rights of the assured and beneficiaries under it. 2. It was competent for the insurer (the cancellation and letter in relation thereto being relied on as an excuse for non-payment of the premium when it fell due) to show that the cancellation was made in ignorance of the delivery of the policy or the payment of the premium, so as to relieve itself of the charge of an intentional abandonment of the contract with the knowledge that the assured had performed on his part, and was relying on it. 3. The cancellation of the policy and letter written in relation thereto were not a sufficient excuse for failing to pay or tender the premium when it fell due, although the cancellation became known to the assured only a few days before the premium was payable. *Ib.*
 7. *Insurance law ; violation of ; who cannot invoke.* — The rule that a contract founded on an act prohibited by statute is void, is subject to the qualification that although the legislature may forbid the doing of a particular act, yet unless the act itself is declared void, a party not privy to it, or involved in the guilt of the transaction, may recover of the guilty actor. The insurance company doing business here without complying with the state laws, and not the citizen with whom it contracts, violates the statutes, and it cannot avail itself of its own violation of law to avoid its contract. *Ib.*

LIMITATIONS, STATUTE OF. See EXECUTORS AND ADMINISTRATORS, 8.

MANDAMUS.

1. *Mandamus not allowed to compel approval of official bonds.* — The statutes of this State, in regard to the approval of official bonds, confer upon the officers intrusted with that duty judicial, not ministerial power, the exercise of which cannot be revised by *mandamus*. (*Ex parte Harris, ante*, p. 87, reëxamined and reaffirmed.) *Semble*, that *mandamus* would lie if the refusal to approve an official bond proceeded from mere arbitrariness, whim, or caprice. *Ex parte Thompson*, 98.
2. *Same.* — The approval of official bonds, under the statutes of this State, is the exercise of judicial, not of ministerial power, and *mandamus* will not lie to revise the exercise of the power. (*Overruling Ex parte Candee*, 48 Ala. 586, and *State ex rel. v. Ely*, 43 Ala. 386.) *Ex parte Harris*, 87.
3. *Mandamus; when will not lie.* — *Mandamus* is not the proper remedy to try the right to a public office of which there is a *de facto* incumbent. Nor will it lie in any case to compel the performance of duty or exercise of power, unless the relator has a clear legal right to demand it, and is without any other adequate and specific remedy. *Ib.*
4. *Same.* — One appointed by the governor to an office, to fill a vacancy duly certified and caused by the failure of the person elected to file a bond within the time prescribed by law, upon qualifying and entering upon the discharge of the duties of the office, becomes an officer *de facto*, and his title can be tried only on *quo warranto*, or information in the nature of *quo warranto*. *Mandamus* is not the remedy. *Ib.*
5. *Same.* — A probate judge cannot be compelled by *mandamus* to file and record a sheriff's bond, approved by an officer who had no authority to do so. *Cook v. Candee*, 109.
6. *Same.* — Application for *mandamus* to compel the dismissal of a cause out of a court to which, on application for change of *venue*, the trial was directed to be transferred under a writ of *mandamus* from this court, on a former term, at the petitioner's instance, will be denied. The court expresses surprise that such an application should be made. *Ex parte Reeves*, 394.
7. *Mandamus; when proper remedy.* — *Mandamus* allowed in this case to restore a county solicitor to office, who has been improperly suspended upon indictment found against him for an offence committed after the passage of the act. *Ex parte Diggs*, 381.
8. *Same.* — When a claim has been duly audited and allowed by the commissioners' court *mandamus* will lie, if the commissioners' court refuses to act, to compel the collection of such tax as the law authorizes to pay such claims. After this, if the treasurer fails to pay them in their order, section 930 of the Revised Code furnishes an adequate remedy. *Eltmore Co. v. Long*, 277.

MARRIAGE LICENSE.

1. *Marriage license; what does not invalidate.* — Non-residence of the female in the county in which the marriage license issues does not invalidate the license, or render void the marriage solemnized under it. *Ely v. Gammel*, 584.
2. *License; whose consent to, necessary.* — Where the father has actual, rightful custody of the minor, he alone can consent to the issue of the license. Proof of acts of adultery on the part of the father during the subsistence of the marriage relation with the mother of the minor does not of itself forfeit the father's right to the custody and control

MARRIAGE LICENSE — Continued.

of the child, so as to authorize the mother, contrary to his wishes, to give a valid consent to the issue of the license. *Ely v. Gammel*, 584.

MINUTES.

Minutes. — The failure of the presiding judge to sign the minutes of the court, does not affect their validity. *Ex parte Owens*, 473.

MORTGAGE.

1. *Mortgage of personalty ; when valid.* — Personalty passes by a mortgage of both personal and real property, to which the mortgagor affixes his mark without an attesting witness, if its execution is acknowledged before a proper officer who duly certifies it. *Breene v. McCrary*, 154.
2. *Same ; when properly admitted to record.* — Upon such an acknowledgment and certificate, such mortgage is properly admitted to record. *Ib.*
3. *Mortgagee ; when treated as bonâ fide purchaser.* — Where a mortgage is made as security for a debt, contracted contemporaneously with it, the mortgagee becomes a *bonâ fide* purchaser, entitled to protection against an outstanding vendor's lien of which he had no notice. *Battle v. Short*, 456.
4. *Trespasser ; what questions cannot raise.* — A mere naked trespasser sued by the mortgagee in trover for the conversion of mortgaged property, cannot question the validity of sale by plaintiff of a portion of the mortgaged property, nor complain of the application of the proceeds as between different debts of the mortgagor, nor ask an allowance or deduction of profits on resale of property purchased by mortgagee at his own sale. *Broughton v. Atchison*, 62.

See ACTION, 12 ; CHANCERY, 15 ; LANDLORD AND TENANT, 2, 3.

NECESSARIES. See HUSBAND AND WIFE, 9.**NEW TRIAL.**

Practice as to grant of new trial. — If the party in whose favor the new trial is granted is unwilling to accept the terms imposed, he should have an entry to that effect made on the minutes or have the order annulled. Incorporating an exception to the grant of the new trial in the bill of exceptions is not a rejection of the terms imposed, but indicative rather of an intention to rely on the exception, and that failing, to comply with the order and claim the new trial under it. *Tannenbaum v. Tankersly*, 489.

NON-CLAIM, STATUTE OF. See EXECUTORS AND ADMINISTRATORS, 9, 10, 11.**NONSUIT. See ERROR AND APPEAL, 5.****OFFICE — OFFICER.**

1. *Office ; a public trust.* — Under the Constitution and laws of Alabama an office is not property, but a mere public trust created for the benefit of the State and not for the advancement of the officer. *Ex parte Lambert*, 79.
2. *Same ; legislative power over.* — Unless expressly inhibited by the Constitution, the legislature has entire control over the compensation of officers, whether the office is created by statute or owes its origin to the Constitution. *Ib.*
3. *Office ; not property.* — In this State offices are not property in any strict legal sense. *Beebe v. Robinson*, 66.
4. *Address of grand jury ; what sufficient to authorize requisition of additional bond.* — A report by the grand jury of the city court of Montgomery, made in term time, and addressed to the presiding judge of

OFFICE — OFFICER — *Continued.*

that court, as follows : “ *We find the bonds of the county officers good except that of the tax-collector. We recommend that he be required to give additional security,*” properly certified to the probate judge of that county, authorizes him to require an additional bond of the tax-collector. *Beebe v. Robinson*, 66.

5. *Vacancy in office ; what creates.* — The failure of a public officer to give an additional bond, legally required of him, occasions a vacancy in the office, which, being duly certified, authorizes the appointment of another to fill it or the institution of judicial proceedings to divest the right of the former incumbent. *Ib.*
6. *Same ; when former officer, after vacancy occurring, may be treated as officer de facto.* — The official acts of a tax-collector, who, failing to give an additional bond, obtained an injunction restraining the governor's appointee from claiming the office or exercising any of the duties thereof, and thereafter continued to discharge the duties of the office, will, so far as necessary for the protection of third persons and the public, be treated as the acts of an officer *de facto*. *Ib.*
7. *Same ; former incumbent and not appointee must resort to action to determine right to office.* — One duly appointed, commissioned, and qualified to fill a vacancy in office duly certified to the appointing power, becomes the legal incumbent, and entitled to discharge the duties of the office. The former incumbent and not the appointee must resort to an action at law to determine the right to the office. *Ib.*
8. *Same.* — An appointee duly commissioned and qualified to fill a vacancy in an office, duly certified to the appointing power, cannot be restrained or interfered with by injunction, at the instance of another claimant, from entering upon the discharge of the duties of the office, nor can his right to the office be determined in any way by the chancery court. *Ib.*
9. *Duty of delivering property of office to successor ; ministerial merely.* — The duty resting on every public officer, on the termination of his official relations, to surrender to his successor the official papers and paraphernalia of the office, is ministerial merely, no matter upon what officer it devolves, and at common law could be enforced by *mandamus*. *Thompson v. Holt*, 491.
10. *Statutes to compel delivery of property, &c. ; how proceedings under are conducted.* — The statutes to compel the delivery of books and property by public officers to their successors are summary, and designed to give a more certain and expeditious remedy than that existing at common law. The proceedings are not to be conducted as in ordinary adversary suits between private individuals, and are not governed by the same restricted rules of pleading. *Ib.*
11. *Same ; probate judge amenable to.* — It is in his ministerial capacity that the judge of probate is intrusted with the custody of the records and property of the office, and as such he is as amenable to proceedings under the statute to compel their delivery as any other officer. *Ib.*
12. *Circuit judge, jurisdiction of, to exact additional bonds ; what not impaired by.* — The passage of the act of November 3, 1862 (§ 784 R. C.), giving chancellors and supreme court judges concurrent authority with the circuit judge to approve the probate judge's bond, does not withdraw him from the influence of § 174 of the Revised Code, which empowers the circuit judge to exact an additional bond in certain contingencies of probate judges or other officers, whose bonds “ *are required to be approved by a circuit judge.*” *Ib.*
13. *Order for delivery ; what title will support.* — A *prima facie* title to the office, free from all reasonable doubt — a title to which the law attaches the possession of the office, and a right to exercise its functions — must be shown before the judge will make the order, under

OFFICE — OFFICER — Continued.

- the statute, to compel the delivery of the books and property of the office. *Thompson v. Holt*, 491.
14. *Same*; what best evidence of *prima facie* title. — A commission of the governor, granted on a certificate of election, or founded on a proper certificate disclosing a vacancy, is the highest and best evidence of who is the officer, until the ultimate right to the office is determined on *quo warranto*. *Ib.*
 15. *Statutory proceeding*; what evidence inadmissible in. — The circuit judge exercises power judicial, or in its nature judicial, in refusing to approve the bond of a probate judge, and his action cannot be collaterally assailed in a proceeding to compel the delivery of books and property of the office. *Ib.*
 16. *Officer de facto*. — The official acts of a sheriff, recognized as the lawful officer and discharging his duties without molestation or hindrance, done in the interval between the election and qualification of his successor and the assumption of the active discharge of the duties of the office by him, are valid and binding upon parties to suits, third persons, and the public. *Thrower v. The State*, 22.
See MANDAMUS, 1, 2, 3, 4, 5, 7.

ORDINANCES OF CONVENTION OF 1867.

1. *Constitutional Convention of 1867; powers of*. — The powers of the Constitutional Convention of 1867, held under the "Reconstruction Acts" of Congress, were special and limited, and it had not legislative power; but in the power conferred was embraced authority to adopt an ordinance putting in operation the governmental agencies it established in the Constitution, and so organizing them that when the government came into existence, it would continue without an interregnum of power or officers in all its departments. *Plowman v. Thornton*, 559.
2. *Ordinance No. 32; validity of*. — Ordinance No. 32 of that convention, providing that the officers first elected under the Constitution should hold their offices for the term prescribed, and until their successors were elected and qualified, was a valid exercise of this power. The approval by a judicial officer, who was one of the first elected under the Constitution, of an official bond after the election, but before the qualification of his successor, is, in all respects, valid and binding. *Ib.*
See CONSTITUTIONAL LAW, 11.

OVERRULED CASES.

1. *Bryan v. Bruner* (50 Ala. 552), overruled by *Beebe v. Robinson*, 66.
2. *Denechaud v. Berry* (48 Ala. 591); *Glenn v. Glenn* (47 Ala. 204); *Molton v. Martin* (43 Ala. 65), overruled by *Short v. Battle*, 456.
3. *Harrison v. Harrison* (39 Ala. 489), overruled as to points decided in 5th and 6th head-notes of *Fretwell v. McLemore*, 124.
4. *Hale v. Huston, Simes & Co.* (44 Ala. 134), overruled by *Whitfield v. Riddle*, 467.
5. *Flowers v. Bitting* (45 Ala. 448), overruled by *Wimberly v. Dallas*, 196.
6. *Ex parte Chase* (43 Ala. 303), and cases following it, overruled by *Kelly v. The State*, 367.

PARTNERSHIP.

1. *Partnership; real estate purchased with partnership funds, how treated in equity*. — Real estate purchased with partnership funds, for partnership business, is treated in equity as partnership property, without regard to the manner in which it was bought, or to the person to whom the legal title was conveyed. *Little v. Snedecor*, 167.

PARTNERSHIP — *Continued.*

2. *Same* ; when heirs of deceased partner declared trustees. — The heirs of one deceased partner, where the title was in him, will be treated as trustees for the surviving partner. It is immaterial that the trust should be expressed ; if it exists and is clearly proved, it will be enforced as other resulting trusts. *Little v. Snedecor*, 167.

See CHANCERY, 25, 26.

LEADING AND PRACTICE.

I. COMPLAINT.

1. *Declaration* ; what sufficient. — Under the provisions of the Revised Code a declaration on a policy of life insurance is sufficient if it contain a statement of the contract or policy, followed by a general averment that the plaintiff had complied with all the provisions on his part, and that the defendant had not in a specified way performed his part. The conditions of the policy, whether conditions precedent or subsequent, and their performance, need not be alleged other than in the general allegation of performance on the part of the plaintiff ; and although the performance of a condition precedent is averred, proof excusing performance may be made under it. *Brooklyn Life Ins. Co. v. Bledsoe*, 538.
2. *Qui tam action against probate judge for improperly issuing marriage license* ; what complaint sufficient. — In a *qui tam* action against a probate judge for improperly issuing a marriage license, the complaint is not demurrable because it fails to state the sex of the persons named in the license, or that a marriage was solemnized under it, or, in the case of a minor, that the parents or guardians resided in this State. *Ely v. Gammel*, 584.
3. *Same.* — The defect, if it be one, of such complaint for failing to allege the residence of the female in the county in which the license issued, if not objected to below, is cured by verdict and judgment. Non-residence of the female in the county in which the marriage license issues, does not invalidate the license or render void the marriage solemnized under it. *Ib.*
4. *Complaint* ; amendment of. — A complaint by two persons, suing as late partners, trading under a firm name, on an account contracted with them, may be amended by striking out one plaintiff and declaring on the indebtedness as a cause of action in favor of the remaining plaintiff alone. *Lansburg & Co. v. Cohen*, 180.
5. *For what recovery may be had under a count on account, &c.* — Where the manufacturer agrees to take back a piano if defective, and the purchaser tenders it back for that reason, but retains it at the manufacturer's request until a new instrument can be sent on, and this is not done in a reasonable time, the purchaser may refuse to receive one if sent, and under a count on account or verbal contract, may recover the amount of an account made up of items consisting of the price paid, and the expenses of boxing and insuring the piano while it remained awaiting shipment to the manufacturer. *Chickering & Sons v. Bromberg*, 528.

II. DEMURRER.

6. *Demurrer* ; no objection allowed unless distinctly stated. — Under § 2656 R. C., however insufficient pleadings may be in other respects, yet if not obnoxious to the particular grounds of demurrer assigned, the demurrer should be overruled. *Eads v. Murphy*, 520.
7. *Same.* — Under our statutes a demurrer to pleadings, which, though defective in other respects, are not obnoxious to any of the specified grounds, must be overruled. *Daniels v. Hamilton*, 105.
8. *General demurrer.* — A petition for rehearing at law should not be

PLEADING AND PRACTICE — *Continued.* DEMURRER — *Continued.* dismissed and the *supersedeas* quashed, on a mere general motion not pointing out any specific defect. Such a motion is in effect a mere general demurrer. *Martin v. Hudson*, 279.

III. DISCONTINUANCE.

9. *Discontinuance* ; what does not constitute. — Neither a criminal nor a civil proceeding is discontinued because the record fails to show continuances from term to term. *Ex parte Owens*, 473.
10. *Same* ; *presumption of continuance*. — In the absence of some act of the party plaintiff, disclosed by the record, causing a gap or chasm in the proceeding, it will be presumed that it was regularly continued from term to term. *Ib.*

IV. DISMISSAL OF SUIT.

11. *Dismissal of suit for recovery below jurisdiction ; when not proper.* — Judgment should not be set aside and the suit dismissed from the circuit court, because of a recovery for an amount below its jurisdiction, when suit was brought for a sum within the jurisdiction, and the plaintiff makes affidavit that the sum sued for is actually due, and that the recovery of the true amount was prevented by any of the specific causes mentioned in section 2708 of the Revised Code. *Ramsey v. Strobach*, 513.

V. PARTIES.

12. *Parties.* — The mere indorsement of the payee's name in blank remaining on a bill of exchange, introduced as evidence in a suit on the bill, does not show that the legal title was not in them. *Beeson v. Lippman*, 276.
13. *Parties.* — A complaint in trover by the husband alone for the conversion of property which is averred to be the statutory separate estate of the wife, discloses no cause of action in his favor. *Taylor v. Jones*, 78.

VI. PLEAS.

14. *Pleadings, rulings on ; presumptions as to.* — Where the record shows that the defendant pleaded the general issue "with leave to give in evidence any matter that might be specially pleaded," and also a special plea in bar, and it appears that the overruling of a demurrer to the special plea was on a day subsequent to the overruling of a demurrer (the grounds of which are not disclosed) to the plea of the general issue, &c., a recital in the minute-entry, "the plaintiff having declined to plead further, on leave being given," &c., will be construed to mean that the plaintiff's declining to plead over related only to the special plea. In such a case judgment should not be rendered in favor of the defendant, but the plaintiff should be required to proceed upon the issue made in the plea of the general issue. *De Bose v. Marx*, 506.
15. *Plea, what demurrable.* — An unsworn plea by the maker that the plaintiff is not the owner of the note sued on is demurrable, although on motion it would be stricken from the files. *Preston v. Dunham*, 217.
16. *Same ; what frivolous.* — A plea to an action for the price of guano, that inspection laws passed long subsequent to the sale had not been complied with, is frivolous, and should be stricken from the files. *Ib.*
17. *Trespass for false imprisonment ; what sufficient answer to.* — It is a sufficient answer to an action of trespass for maliciously and without probable cause procuring the arrest and imprisonment of plaintiff, that the arrest and imprisonment were made in due course of legal

PLEADING AND PRACTICE — Continued. PLEAS — Continued.

proceeding, by a proper officer, upon affidavit charging the commission of a criminal offence, and that no more force was used than is necessary," &c. *Rhodes v. King*, 272.

VII. GENERAL PRACTICE.

18. *Arrest of judgment; when § 2811 R. C. does not apply to.* — Section 2811 R. C., forbidding the arrest of judgment for matters not previously objected to, has no application where the complaint discloses no cause of action. *Taylor v. Jones*, 78.
19. *Practice; what improper.* — However erroneous the circuit court may deem an opinion of the supreme court, it is neither proper nor just to the parties to diminish its influence with the jury by declaring that it is not law, yet they must be governed by it. *Faulk v. The State*, 416.
20. "Served," "serving;" meaning of. — The legal effect of the words "served," "serving," when used in a sheriff's return or minute-entry in reference to a copy of the indictment and list of jurors, is that such copy and list were "delivered" to the defendant as required by § 4171 R. C. *Walker v. State*, 192.
21. *Introduction of evidence; control of court over.* — The issue being a sale of cattle to defendant and he before closing having testified, as a witness in his own behalf, that the sale was not to him but to a third person, the court cannot require the plaintiff, having the right to rejoin, before introducing declarations of defendant, on a named occasion, to the effect that he had the cattle, to first call the defendant back and ask him if he had made such declarations — they are admissible in rebuttal. *Kimmey v. Calloway*, 222.
22. *Issue as to execution of note foundation of suit; how only can be raised.* — Although a promissory note declared on does not on its face purport to have been executed by the defendant, yet if its execution by him is averred, he cannot deny it, whether it was by mark, initial, or other designation, except by a sworn plea under § 2682 of Revised Code. (Overruling, on this point, *Flowers v. Bitting*, 45 Ala. 448.) *Wimberly v. Dallas*, 196.
23. *Charge as to ownership of cause of action; when erroneous.* — Until there is a sworn plea putting in issue the plaintiff's ownership of a cause of action, founded on a contract for payment of money, no issue can arise as to it, and a charge authorizing a verdict against plaintiff if he is not the owner is erroneous. *Boit & McKenzie v. Maybin*, 252.

See NEW TRIAL, 1.

QUO WARRANTO. See MANDAMUS, 4; OFFICE — OFFICER, 14.

RECEIVER. See CHANCERY, 24.

REHEARING AT LAW.

1. *Rehearing at law; what necessary to authorize.* — To authorize a rehearing at law, under the statute, there must concur a valid defence, the failure to make it (without fault on the part of the petitioner) resulting from surprise, accident, or fraud, and the exercise of all reasonable diligence to interpose the defence before judgment. *Martin & McTyer v. Hudson*, 279.
2. *Same.* — Where the failure to make the defence was due to the accidental absence from sickness of the witness by whom the proof was to be made, it must be shown that he was the only witness by whom the defence could be established; a rehearing not being authorized on account of the failure to introduce mere cumulative or corroborative evidence. *Id.*

REVISED CODE.

1. § 14. Construed. *Dickson & Co. v. Frisbie*, 165.
2. § 784. Effect of on § 174. *Thompson v. Holt*, 491.
3. § 1535-6. Requisites of deed. *Hendon v. White*, 598.
4. § 1561-2. What void without regard to. *Dudley v. Abner*, 572.
5. § 2091. Time when bar commences. *Fretwell v. McLemore*, 124.
6. § 2224. Construed. *Pettus, Adm'r, v. McClannahan*, 55.
7. § 2371. Construed. *Short v. Battle*, 456.
8. § 2656. What not good objection under. *Eads v. Murphy*, 520.
9. § 2704. To what applicable. *Key v. Jones*, 238.
10. § 2708. When suit not dismissed. *Ramsey v. Strobach*, 513.
11. § 2756. Discussed and construed. *Eiland v. State*, 323.
12. § 2759. What revisable under. *Wyatt v. Evins*, 285.
13. § 2811. To what does not apply. *Taylor v. Jones*, 78.
14. § 2814. What requisite under. *Martin v. Hudson*, 279.
15. § 2862. To what applies. *Wimberly v. Dallas*, 196.
16. § 2875. When authorizes sale after defendant's death. *Hendon v. White*, 597.
17. § 3620. Public place in meaning of. *Smith v. State*, 384.
18. § 4167. Not applicable to county court. *State v. McDuffie*, 4.
19. § 4396. Not unconstitutional. *Paulk v. State*, 427.
20. § 4192. When ruling under not revised. *Gassenheimer v. State*, 314.
21. § 4420. Liberally construed. *Thompson v. Campbell*, 583.

SET-OFF. See CHANCERY, 5, 13; CONTRACT, 4.

SEPARATE ESTATE. See HUSBAND AND WIFE.

SHERIFF.

1. *Motion in summary proceeding; when demurrable.* — The motion in a summary proceeding against the sheriff and his sureties, for his failure to make money on an execution, should disclose the name of all the parties against whom judgment is sought, and failing in this is bad on demurrer. *Daniels v. Hamilton*, 105.
 2. *Same; when judgment against sureties erroneous.* — Where the sureties neither appear nor plead, judgment cannot be rendered against them, without proof of the suretyship. *Ib.*
 3. *Same; amount of damages allowed.* — Ten per centum damages on the amount of the execution and interest is the maximum allowed by law in this proceeding. *Ib.*
 4. *Sheriff's return; amendment of.* — The sheriff may amend his return so as to make it speak the truth, and the amendment when made relates back to the date of the original return, and is substituted for it. *Ib.*
- See OFFICE — OFFICERS, 16.

STATUTES.

1. *Statute enacted in terms of a former statute which has been construed; presumption as to legislative construction.* — The legislature, in reenacting a statute substantially in the terms of a former statute which had been judicially construed, will be presumed to have put that construction upon the statute which the prior act had received. *Ex parte Matthews*, 51.
2. *Repeal of statutes; special statutes not repealed by subsequent general statutes.* — A subsequent statute will not repeal a prior act, in the absence of express words of repeal, unless the provisions of the subsequent act are directly antagonistic and repugnant to those of the former. If by any fair construction it is possible for both to have some field of operation, both must stand; especially where the general words of the later statute are the only evidence of the legislative intent to repeal the particular provisions of the former act. *Iverson v. The State*, 170.

STATUTES — Continued.

3. "*Act to suppress murder, lynching, &c., applies to aliens as well as citizens.* — Statutes passed for the security and protection of life, in the absence of clear and unexceptionable language forcing a contrary conclusion, will be held to apply as well to aliens and mere sojourners as to citizens. The fact that the person murdered and the widow, or next of kin, were aliens, is no defence to a recovery under the "Act to suppress murder, lynching, and assaults and batteries," approved December 28, 1868. *Luke v. Calhoun Co.* 115.
4. *Retroactive operation; what act has not.* — The act "to regulate property exempted from sale for payment of debts," approved April 23, 1873, is not retroactive in its operation. *Taylor v. Pettus*, 287.
5. *Penal enactment; what is.* — An enactment providing for suspension from office is a penal statute, and will not be enlarged in its scope by construction. *Ex parte Diggs*, 381.
6. *Act to remove solicitors, &c.; to what applies.* — The act of March 2, 1875, requiring the suspension of a county solicitor against whom an indictment is pending, has no application to indictments for offences committed before its passage. If it did, it would be violative of the constitutional provision against *ex post facto* laws. *Ib.*

SUMMARY PROCEEDINGS. See OFFICE — OFFICER, 10; SHERIFF, 1, 2, 3.

SURETY.

Surety; what will not discharge. — Mere passiveness or delay on the part of the creditor, in the absence of any direction to proceed, to enforce his legal remedies, — *e. g.*, as where, before levy, he suspends execution, — will not discharge the surety. *Summerhill v. Tapp*, 227.
See BILLS OF EXCHANGE, 10; CHANCERY, 6.

TAXES. See COUNTIES, 1.

TRESPASS. See ACTION, 12, 13, 14; MORTGAGE, 4; PLEADING AND PRACTICE, 17.

TROVER. See ACTION, 11, 12.

USE AND OCCUPATION. See ACTION, 3.

VENDOR AND PURCHASER.

1. *Personalty, sale of; when property passes.* — If by the terms of an agreement for the sale of personalty, any material act connected with the subject-matter of the contract remains to be done before delivery, the property does not vest in the buyer until the performance of that act; and where the contract is not in writing, it is a question for the jury to determine on the evidence, under appropriate instructions from the court, whether a contract was made, and if so, whether it was executed or merely executory. *Darden v. Lovelace*, 289.
2. *Conditional sale; what is, and how affects bonâ fide purchaser.* — Where the owner delivers a mare to another to keep and work her, with the understanding "that the mare is to belong to the owner until the price is paid, when the owner is to give a receipt or bill of sale," the transaction constitutes a conditional sale, void as against *bonâ fide* purchasers without reference to the registration laws. *Dudley v. Abner*, 572.
3. *Trover; what acts of plaintiff do not estop him from bringing.* — Where the plaintiff, an illiterate negro, acting upon the advice of the defendant and another person of influence and standing, delivered up property to defendant, who claimed to hold a mortgage on it, this does not estop him from bringing *trover* against the defendant for the conversion, if it turns out that the property is not subject to the claim asserted. *Ib.*

VENDOR AND PURCHASER — *Continued.*

4. *Purchaser; what charged with notice of.* — A purchaser buying real estate, of the title to which there must be evidence in writing, is chargeable with notice of any infirmity of his title which the writing discloses. *Corbitt v. Clenny*, 480.
5. *Price of thing sold, when worthlessness of not defence to action for.* — In the absence of any warranty, fraudulent representation, or concealment, the worthlessness of the thing sold, or that it was of "no benefit" for the purpose for which it was bought, is no defence to an action against the buyer for the price. *Boil & McKenzie v. Maybin*, 252.
6. *Same.* — The unsoundness or worthlessness of an article purchased is no defence to a recovery for the price, when there was no warranty, false representation, or fraudulent concealment. *Preston v. Dunkam*, 217.

See ACTION, 11; LANDLORD AND TENANT, 1.

VENUE, CHANGE OF.

1. *Change of venue; discretionary with primary court.* — An application for a change of venue is addressed to the sound discretion of the primary court, and its exercise in granting or refusing the change is not subject to revision. (Overruling *Ex parte Chase*, 43 Ala. 303, and the cases following it.) *Kelly v. The State*, 361.
2. *Certificate of clerk, on change of venue; what not essential to.* — It is not essential that the clerk's certificate appended to the transcript of the proceedings of the court from which the venue, in a criminal case, is changed, should be under his seal either public or private. *Boddie v. The State*, 395.
3. *Certified transcript, objection to; when should be made.* — Whether going to trial on an imperfect transcript is a waiver of its defects is not decided, but the court declares it safer to make the objection earlier. *Ib.*

WILLS.

1. *Testamentary capacity as to personality.* — Testamentary capacity as to personality is governed by the law of the last domicile. *Daniel v. Hill*, 430.
2. *Domicil of minor; how arises and changes.* — The domicile of the minor follows and changes with that of the parents, and if the father dies, his last domicile is that of the infant children. *Ib.*
3. *Same; guardian cannot change.* — The guardian cannot change the domicile acquired by the ward at the place of his birth, or derived from his father at his death. *Ib.*
4. *Same; testamentary capacity of ward; what law fixes.* — A ward whose parents died domiciled in Alabama, where letters of guardianship of his person and estate had been granted, does not lose or change his domicile here, because he accompanies his guardian, on his change of residence, to another State; and the ward dying testate in the latter State, his testamentary capacity must be measured by the laws of Alabama. *Ib.*
5. *Same; recital as to, not conclusive.* — A recital in a will that the testator is of a particular place, is never conclusive as to domicile, and may be rebutted by proof of the actual domicile. *Ib.*
6. *Will; essentials of.* — It is of the essence of a will that it be ambulatory and revocable in its nature during the life of the testator. An instrument possessing these characteristics, fairly apparent from the face of it, no matter how irregular in form or inartificial in expression, or by what name designated, must have effect as a will. *Ib.*
7. *Will; what instrument is.* — A written instrument was as follows: "Know all men by these presents, that I, R. D. M. . . . do for

WILLS — Continued.

- the love I have for my uncle A. S. D., and my aunt M. A. D., if I do not live to be twenty-one years of age, I give to them all the money I have in the hands of my uncle A. S. D., who is my guardian, to have and to hold as theirs forever, their assigns, &c., the record of which is in the probate court of Greene county, Alabama. In witness whereof I have set my hand and seal, this March 10th, 1869. R. D. McAlpine. [L. S.]” It was properly attested by two witnesses: *Held*, a will, not a deed. *Daniel v. Hill*, 430.
8. *Confidential relations between testator and legatee ; what imposes on proponent of will.* — The existence of confidential relations between the testator and legatee or devisee excites the suspicion and jealousy of the court, and casts upon the proponent of the will the duty of showing, by affirmative evidence, the testator’s capacity, volition, and free agency. *Ib.*
 9. *Same ; when will established, notwithstanding.* — When all suspicious circumstances are explained, all legitimate inferences of undue influence repelled, and all doubts and presumptions, generated from the confidential relation, cleared away by affirmative evidence, which satisfies the conscience of the court of the capacity of the testator, his knowledge of the contents of the will, and its expression of his spontaneous intentions, the will is valid ; and this, notwithstanding the confidential relations between the testator and the person drawing the will, who takes the principal or sole benefit under it. *Ib.*
 10. *Same.* — In this case a will drawn by the guardian, and executed only in the presence of his immediate family, by which his nephew and ward bequeathed to the guardian and his wife all the ward’s property then in the guardian’s hands, in exclusion of a sister of the whole and one of the half blood, was sustained ; the court reviewing at length the evidence, which clearly showed the testator’s capacity, repelled all suspicion of undue influence, and established that the testator’s disposition of his property was in accordance with the state of his affections, and clearly expressed his spontaneous intentions. *Ib.*
 11. *Minor ; testamentary capacity of.* — A minor has not testamentary capacity to devise land, or to charge it with payment of legacies. *Banks et ux. v. Sherrod*, 267.
 12. *Same.* — Under our statutes, a minor over eighteen years of age may make a valid bequest of personalty or subject it to the payment of legacies ; but on failure or insufficiency of personalty the legacy cannot become a charge on the realty which descends to the heir. *Ib.*
 13. *Will ; decree probating ; what conclusive of.* — A decree of probate of a will which disposes of personalty only, although it incidentally alludes to testator’s realty, — *e. g.*, as that none of it be sold to pay legacies, — is conclusive only of its *factum* and validity as a will of personalty. *Ib.*
 14. *Practice.* — Practice suggested as to probate of a will of a minor disposing of personalty. *Ib.*

WITNESS.

1. *Competency of.* — In a suit on a deceased administrator’s bond against his surety to recover the amount of a decree rendered against the deceased in his lifetime, the administrator of the deceased, having testified to conversations had with the plaintiff tending to show that deceased had settled the decree, the plaintiff is a competent witness to prove that the settlement, as to which he had such conversation, did not relate to the decree. *Cousins v. Jackson*, 262.
2. *Same.* — A party in interest is not a competent witness to prove ad-

WITNESS — *Continued.*

missions or declarations made by a decedent, or transactions had with him in his lifetime, when the purpose of the evidence is to diminish the rights of a decedent or those claiming in succession to him. *Key v. Jones*, 238.

3. *Same.* — The owner of stolen property is a competent witness against a party charged with having received it knowing that it had been stolen. *Gassenheimer v. The State*, 313.
4. *Witness; putting under rule.* — An order putting witnesses under the rule is discretionary with the court, but should seldom, if ever, be refused when applied for. It is in the discretion of the court to permit or refuse the examination of a witness who violates the rule, and the exercise of this discretion is not revisable; but a witness should not be excluded merely because he has heard the reading of the indictment or pleadings. *Wilson v. The State*, 299.
5. *Admissions.* — Where a witness testifies that the plaintiff in answer to a question made certain admissions in one conversation, and the plaintiff testifies that the question was asked in a different conversation, it is error to refuse to permit the plaintiff to testify what reply he made, on the assumption that the question relates to a different conversation from that about which the witness testified. It is a question for the jury to determine, under appropriate instructions from the court. *Cousins v. Jackson*, 262.

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